

CH. 55
VERDICTS

§55-1 [General Verdicts](#) ([CumDigest](#))

§55-2 [Inconsistent Verdicts](#) ([CumDigest](#))

§55-3 **Multiple Convictions Based on the Same Conduct**

(a) [General Rule](#) ([CumDigest](#))

(b) [Multiple Convictions Upheld](#) ([CumDigest](#))

(c) [Multiple Convictions Improper](#) ([CumDigest](#))

§55-4 [Impeachment of Verdicts](#)

[Top](#)

§55-1

General Verdicts

[Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 \(1979\)](#) When a case is submitted to the jury on alternative theories, the unconstitutionality of any of the theories requires that the conviction be set aside.

[Griffin v. U.S., 502 U.S. 46, 112 S.Ct. 466 116 L.Ed.2d 371 \(1991\)](#) Although a general verdict cannot stand where it might have been based on an unconstitutional theory of guilt, a mere lack of evidence on one of several counts does not require that a general verdict be vacated. Instead, there is a presumption that the jury convicted on a count that was supported by the evidence.

[People v. Lymore, 25 Ill.2d 305, 185 N.E.2d 158 \(1962\)](#) A general finding of guilty is presumed to be based on any good count in the indictment to which the proof is applicable. Where a general verdict is returned on an indictment containing several counts arising from a single transaction, defendant is guilty as charged in each count. Furthermore, the verdict will be sustained if the punishment imposed is one that is authorized to be inflicted for the offense charged in any one or more of the counts.

[People v. Cardona, 158 Ill.2d 403, 634 N.E.2d 720 \(1994\)](#) Where a general verdict is returned on an indictment containing several counts arising from a single transaction, defendant is presumed to have been convicted on all counts for which sufficient evidence was presented. Since only one conviction of murder can be entered where only one death occurred, however, judgment and sentence are to be imposed only for the most serious offense.

Where the jury returned a general verdict on intentional, knowing and felony murder, and the State presented sufficient evidence to convict of intentional murder, that offense involves the most culpable mental state and is therefore the most serious crime. Thus, judgment should have been entered on the intentional murder count. See also, [People v. Morgan, 197 Ill.2d 404, 758 N.E.2d 813 \(2001\)](#) (same).

The jury's questions, which asked whether defendant should be convicted of murder if he was guilty of residential burglary and for an explanation of the law of accountability, did not necessarily suggest a belief that defendant was not guilty of intentional murder.

[People v. Pitsonbarger, 142 Ill.2d 353, 568 N.E.2d 783 \(1990\)](#) Where the evidence is sufficient to convict defendant of the crime charged in the indictment, the reviewing court will not speculate that the guilty verdict was for a crime not charged.

[People v. Dibble, 317 Ill.App.3d 252, 739 N.E.2d 578 \(5th Dist. 2000\)](#) A general verdict is improper where the conviction may have been based on an unconstitutional theory of law. Where there is merely a failure of proof on one of the theories on which a general verdict rests, however, the verdict is presumed to have been based on a theory for which the evidence was sufficient.

[People v. Lloyd, 93 Ill.App.3d 1018, 418 N.E.2d 131 \(1st Dist. 1981\)](#) A defendant will be deemed guilty of each count when a general verdict of guilty is returned.

[People v. Scott, 243 Ill.App.3d 167, 612 N.E.2d 7 \(1st Dist. 1993\)](#) Defendant was charged with three counts of delivery of PCP, each involving a different undercover officer. The trial court modified the State's tendered instructions so that the jury received only one "guilty" and one "not guilty" verdict (instead of "guilty" and "not guilty" verdicts on each count).

The failure to submit separate verdict forms was plain error that denied defendant his Illinois constitutional right to a unanimous verdict. Under the circumstances of this case, it was plausible that not all twelve jurors believed defendant was guilty of the same count of delivery.

[People v. Harper, 251 Ill.App.3d 801, 623 N.E.2d 775 \(4th Dist. 1993\)](#) Defendant, who was charged with aggravated criminal sexual abuse for having sexual intercourse with a 14-year-old girl, told police that both oral sex and intercourse had occurred. However, at trial he denied having any sexual contact with the complainant and claimed that police had fabricated the statement. The jury instructions required that the State establish "sexual penetration," which was defined as "any contact, however slight, between the sex organ of one person and the sex organ of another person, including but not limited to cunnilingus, fellatio, or anal penetration." Defendant claimed that the instructions were improper because the jury could convict him even if it did not unanimously agree concerning the type of penetration that had occurred.

The jury is required to reach a unanimous conclusion only as to a defendant's ultimate guilt or innocence. Thus, where a general verdict is returned on an offense which can be committed in various ways, unanimity as to the means of commission is unnecessary. See also, [People v. Rand, 291 Ill.App.3d 431, 683 N.E.2d 1243 \(1st Dist. 1997\)](#).

[People v. Slywka, 365 Ill.App.3d 34, 847 N.E.2d 780 \(1st Dist. 2006\)](#) The "one good count" rule sustained defendant's conviction for first degree murder, although collateral estoppel precluded a conviction on one theory with which defendant was charged. Although the "one good count" rule does not apply where the general verdict was tainted by a "legally deficient" count, application of the collateral estoppel doctrine to an intentional murder charge involves not a legally defective count or instruction, but merely an alternative charging method that was factually barred in this case. Because the jury's general verdict of guilt was not "tainted" by the charge on which collateral estoppel applied, the "one good count" rule could be applied.

Cumulative Digest Case Summaries §55-1

[People v. Holmes, 241 Ill.2d 509, 948 N.E.2d 617 \(2011\)](#)

When a defendant is charged with an offense in multiple counts based on different theories, a general verdict of guilty does not evidence the jury unanimous agreement that any one of the alleged means of committing the offense was proved beyond a reasonable doubt. The jury's general verdict could be based on any combination of findings with respect to the theories charged.

Defendant was charged with aggravated UUV based on the alternative allegations that the firearm he possessed was "uncased, loaded and immediately accessible" or that he possessed the firearm and had not been issued a currently valid FOID card. The jury returned a general verdict of guilty. This general verdict could not support a conviction of the lesser-included offense of misdemeanor UUV for carrying a firearm in his vehicle that was either immediately accessible or not unloaded and enclosed in a case.

The testimony at trial conflicted as to whether the gun was loaded or immediately accessible to defendant. The jury may have unanimously agreed that defendant lacked a FOID card. Or some of the jurors may have agreed on one count and not the other. Therefore, it could not be concluded from the general verdict that the jury unanimously found that the gun was loaded or immediately accessible so as to support a conviction for misdemeanor UUV.

(Defendant was represented by Assistant Defender Kristine Neal, Chicago.)

[People v. Hill, 2014 IL App \(2d\) 120506 \(No. 2-12-0506, 3/31/14\)](#)

The defendant is presumed to have been convicted of the least serious offense where the jury returns a general verdict after the trial court denies a defense request for specific verdicts on multiple counts of first degree murder which carry sentencing and "one-act, one-crime" ramifications. ([People v. Smith, 233 Ill. 2d](#)

[1, 906 N.E.2d 529 \(2009\)](#)). Thus, where the jury returned a general verdict after the trial court refused a request for specific verdict forms, and a consecutive sentence would be required for the predicate of felony murder if the conviction was for intentional or knowing murder, the trial court must vacate the conviction for the predicate of felony murder.

The court noted that **Smith** has been limited to situations in which the trial court refuses a defense request for separate verdict forms. Thus, the failure to request separate verdicts cannot form the basis for a finding of ineffective assistance.

Defendant's convictions for first degree murder and aggravated arson were affirmed.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

[People v. Reed, 405 Ill.App.3d 279, 938 N.E.2d 199 \(1st Dist. 2010\)](#)

Where a general verdict is delivered for a defendant charged with murder in multiple counts alleging intentional, knowing, and felony murder, the conviction is presumed to be for the most serious offense - intentional murder. Under [People v. Smith, 233 Ill.2d 1, 906 N.E.2d 529 \(2009\)](#), however, a general verdict form cannot be presumed to be a finding of intentional murder when the trial court refused a request for separate verdict forms, there was a basis in the evidence for the request, and there are sentencing ramifications of convictions on separate counts. Under such circumstances, the appropriate remedy is to interpret the general verdict as a conviction for felony murder.

Here, defendant was charged with two counts of felony murder based on the predicate felonies of armed robbery and residential burglary. Because the trial court refused a request for specific verdict forms, the general verdict must be interpreted as a verdict on felony murder. Furthermore, because a defendant may not be convicted of both felony murder and the underlying predicate, defendant's convictions for armed robbery and residential burglary were reversed.

(Defendant was represented by Assistant Defender Linda Olthoff, Chicago.)

[Top](#)

§55-2

Inconsistent Verdicts

[U.S. v. Powell, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 \(1984\)](#) Legally inconsistent verdicts may stand as they may be the result of nothing more than juror lenity. Such verdicts do not show that the jury was not convinced of defendant's guilt, but rather that the jurors exercised a power to which they had no right.

[Standefer v. U.S., 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 \(1980\)](#) A defendant may be convicted of a federal offense though the principal has been acquitted. Neither double jeopardy nor due process prohibit the trial of an accomplice because another jury has determined that the principal was not guilty.

[Harris v. Rivera, 454 U.S. 339, 102 S.Ct. 460, 70 L.Ed.2d 530 \(1981\)](#) Apparent inconsistent verdicts regarding co-defendants at a bench trial did not give rise to an inference of irregularity that required reversal. The "well-established presumption that the judge adhered to basic rules of procedure" was not overcome.

[People v. Jones, 207 Ill.2d 122, 797 N.E.2d 640 \(2003\)](#) Neither legal nor logical consistency in verdicts is required. "Thus, defendants in Illinois can no longer challenge convictions on the sole basis that they are legally inconsistent with acquittals on other charges."

[People v. McCoy, 207 Ill.2d 352, 799 N.E.2d 269 \(2003\)](#) The rule that a criminal defendant may not

challenge a conviction because it is legally inconsistent with an acquittal on another charge should be applied to bench trials. The trial court's actions in convicting of two counts of aggravated criminal sexual assault while acquitting of several other charges might "reflect sound judicial management given the repetitive multiple counts of the 15-count information."

[**People v. Pelt**, 207 Ill.2d 434, 800 N.E.2d 1193 \(2003\)](#) Defendant was not entitled to have his conviction for aggravated battery of a child vacated because it was legally inconsistent with the finding of not guilty for knowing murder.

[**People v. Hairston**, 46 Ill.2d 348, 263 N.E.2d 840 \(1970\)](#) There is no inconsistency in verdicts of acquittal and conviction concerning crimes arising from the same facts but composed of different elements. Verdicts need not be logically consistent.

[**People v. Dawson**, 60 Ill.2d 278, 326 N.E.2d 755 \(1975\)](#) Verdicts finding defendant guilty of armed robbery and not guilty of felony murder, arising out of the same incident, were not inconsistent. A jury may acquit of one or more counts in a multi-count indictment because it believes that the counts on which it convicted will provide sufficient punishment.

[**People v. Porter**, 168 Ill.2d 201, 659 N.E.2d 915 \(1995\)](#) A trial court has a duty to reject inconsistent guilty verdicts and to instruct the jury to resolve the inconsistency. Here, the jury convicted defendant of two counts of first degree murder and two counts of second degree murder, all involving a single victim. The judge erred in entering judgment on one of the four verdicts and should have required the jury to deliberate further to resolve the inconsistency.

[**People v. Price & Rose**, 221 Ill.2d 182, 850 N.E.2d 199 \(2006\)](#) Verdicts convicting defendants of theft by: (1) exerting unauthorized control over property with intent to permanently deprive, and (2) obtaining control over property under circumstances which would lead one to believe that the property was stolen, were not legally inconsistent.

Legally inconsistent verdicts occur where, although the offenses arise from the same set of facts, the verdicts find that an essential element of each crime has been found to exist and not to exist. Because the theft counts did not contain inconsistent elements, and both offenses could have applied to the defendants' conduct, the verdicts were not legally inconsistent.

[**People v. Spears**, 112 Ill.2d 396, 493 N.E.2d 1030 \(1986\)](#) Defendant was found guilty of attempt murder, armed violence based on aggravated battery and reckless conduct against one person, and armed violence based on aggravated battery and reckless conduct against a second person. The verdicts were legally and logically inconsistent since the jury "in effect" found that defendant acted recklessly (reckless conduct), intentionally (attempted murder) and knowingly (armed violence based on aggravated battery). Reversal was required. See also, [**People v. Fornear**, 176 Ill.2d 523, 680 N.E.2d 1383 \(1997\)](#) (Spears remains the law in Illinois - recklessness and knowledge are "mutually inconsistent" mental states; furthermore, the State may not assert on appeal a theory to explain inconsistent verdicts where at trial it asserted a conflicting theory of the case); [**People v. Mitchell**, 238 Ill.App.3d 1055, 605 N.E.2d 1055 \(2d Dist. 1992\)](#) (convictions for attempt murder and reckless conduct were inconsistent where the State's evidence, the jury instructions and the charges all failed to distinguish between defendant's intent when he fired certain shots and when he fired others.)

[**People v. Rhoden**, 299 Ill.App.3d 951, 702 N.E.2d 209 \(1st Dist. 1998\)](#) Legally inconsistent findings returned in a bench trial may stand if there is a rational basis for the judgment and an examination of the record as a whole indicates that there was no confusion on the part of the judge. Here, a directed verdict on attempt robbery was consistent with convictions for attempt armed robbery and felony murder based on

attempt armed robbery; the trial court recognized that the offender was in possession of a weapon at all times, and therefore was either guilty of the greater offense or not guilty at all.

[People v. Batson, 144 Ill.App.3d 1027, 495 N.E.2d 154 \(5th Dist. 1986\)](#) Guilty verdicts on murder, voluntary manslaughter and reckless homicide were legally inconsistent. See also, [People v. O'Neil, 194 Ill.App.3d 79, 550 N.E.2d 1090 \(1st Dist. 1990\)](#) (murder and involuntary manslaughter).

[People v. Coleman, 131 Ill.App.3d 76, 475 N.E.2d 565 \(1st Dist. 1985\)](#) Verdicts finding defendant guilty of attempt murder and reckless conduct were legally inconsistent. Attempt requires that the defendant "intended to commit a specific offense," while recklessness "involves no specific intent but rather a conscious disregard of the consequences of one's actions."

[People v. Rogers, 104 Ill.App.3d 326, 432 N.E.2d 975 \(1st Dist. 1982\)](#) There is no inconsistency when the trial judge, at a bench trial, enters only one finding - guilty on one count and no finding on two other counts. Where there is only one finding, there is nothing with which it can be inconsistent. The fact that there is an implied acquittal when no finding is entered does not show any inconsistency.

[People v. Carter, 19 Ill.App.3d 21, 311 N.E.2d 213 \(1st Dist. 1974\)](#) Where the evidence against defendant, who was found guilty by a jury, was no stronger than that against a co-defendant who was acquitted by a judge, the inconsistent findings raise a reasonable doubt as to defendant's guilt. Where co-defendants are tried on the same facts, the verdicts should be consistent. Reversed.

[People v. Chambers, 219 Ill.App.3d 470, 579 N.E.2d 875 \(1st Dist. 1991\)](#) Verdicts of guilty on attempt murder and reckless conduct were legally inconsistent. Attempt murder requires specific intent to kill, while reckless conduct requires the lesser mental state of recklessness.

Furthermore, the verdicts could not be reconciled on the basis of defendant's commission of separate acts (i.e., pointing and attempting to fire a gun followed by the act of struggling with the complainant when the gun failed to fire). The evidence did not support a conclusion that defendant's state of mind varied during the acts.

[People v. Becker, 315 Ill.App.3d 980, 734 N.E.2d 987 \(1st Dist. 2000\)](#) Where allegedly culpable conduct is essentially one act, the trier of fact may not find that defendant simultaneously acted knowingly and recklessly. Here, involuntary manslaughter and armed violence counts alleged the same conduct - that defendant engaged in an unjustified physical altercation with the decedent, during which the decedent was fatally wounded. However, the involuntary manslaughter count involved a mental state of recklessness while armed violence required knowledge. The record did not suggest that defendant committed separate knowing and reckless acts or that his mental state changed during the incident. The guilty verdicts were inconsistent.

Where the jury returns legally inconsistent guilty verdicts, the trial court should give additional instructions and require further deliberations. On retrial the court should instruct the jury before it begins deliberating that it cannot simultaneously return guilty verdicts for both reckless and knowing offenses.

[People v. Randle, 213 Ill.App.3d 1082, 572 N.E.2d 1207 \(3d Dist. 1991\)](#) Conviction for armed violence predicated on aggravated battery is inconsistent with reckless conduct conviction; defendant may not simultaneously act recklessly and intentionally.

[People v. Rentfrow, 221 Ill.App.3d 112, 581 N.E.2d 746 \(5th Dist. 1991\)](#) When legally inconsistent guilty verdicts are returned, defendant is entitled to a new trial on all counts.

People v. Lefler, 2016 IL App (3d) 140293 (No. 3-14-0293, 1/21/16)

Jury verdicts are legally inconsistent when the offenses arise out of the same set of facts and a jury finds that an essential element of the offense both exists and does not exist.

The victim caught defendant breaking into his car and during an ensuing struggle, defendant stabbed the victim, killing him. At trial defendant argued that he was acting in self-defense when he stabbed the victim. The jury found defendant guilty of both felony murder and second degree murder.

The Appellate Court held that the verdicts for felony murder and second degree murder were not legally inconsistent. A defendant commits first degree murder if he kills another and he: (1) intends to kill or do great bodily harm; (2) knows that his acts create a strong probability of death or great bodily harm; or (3) is attempting or committing a forcible felony. [720 ILCS 5/9-1](#).

Second degree murder is a mitigated form of first degree murder, but only as to the first two forms of first degree murder. The jury first determines that defendant killed another with intent or knowledge and then determines whether mitigating factors exist that would reduce the offense to second degree murder. But second degree murder does not apply to the third form of first degree murder, felony murder. [720 ILCS 5/9-2](#).

The jury clearly found that mitigating factors existed and properly returned a verdict reducing first degree murder based on intent or knowledge to second degree murder. But since second degree murder does not apply to felony murder, the jury's finding of mitigation was not legally inconsistent with a guilty verdict as to felony murder.

Defendant's conviction for felony murder was affirmed.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

People v. Peoples, 2015 IL App (1st) 121717 (No. 1-12-1717, 6/30/15)

1. The State charged defendant with first degree murder and a firearm enhancement alleging that he personally discharged a firearm that proximately caused death. Six witnesses testified at trial that the fatal shots were fired from a white van. Three of those witnesses identified defendant as being one of the men in the van and of those three, two testified that defendant fired a gun. The State charged defendant as the principal and argued that he personally fired the fatal shots. The State never argued or pursued a theory at trial that defendant was accountable for the shooting and did not request accountability instructions.

During deliberations, the jury sent a note asking whether someone can be guilty of murder and "not pull the trigger." The note further stated that "we are struggling with the concept of a guilty verdict but not having enough evidence that shows or proves [defendant] was the shooter." Over defendant's objection, the court answered the jury's question: "Dear Jury, the answer is Yes." Five minutes later the jury found defendant guilty of first degree murder, but acquitted him of the firearm enhancement.

2. The Appellate Court held that the trial court's response to the jury's question was incorrect. Under the facts of this case, where the State never pursued a theory of accountability at trial, it was improper to instruct the jury that it could convict on a theory of accountability. The Court also found that the error was not harmless beyond a reasonable doubt. There was a serious risk that defendant was convicted on a theory never presented to the jury and which defendant never had a chance to contest.

3. The Court, however, did not find that the error required an outright reversal of defendant's conviction. Although the guilty verdict on first degree murder conflicted with the acquittal of the firearm enhancement, legally inconsistent verdicts do not mandate outright reversal of a conviction. And even though the facts of this case strongly suggested that the jury did not believe defendant was the "principal shooter," such a conclusion would still be speculation, and a reviewing court "may not guess as to why a jury did what it did, no matter how obvious it may seem."

The Court remanded the case for a new trial.

(Defendant was represented by former Assistant Defenders Patrick Morales-Doyle and Rachel Moran, Chicago.)

[People v. Reed, Ill.App.3d , 919 N.E.2d 1106 \(4th Dist. 2009\)](#)

The Appellate Court reiterated that no statutory authority exists for using special interrogatories in criminal cases. Thus, the jury's answer to a special interrogatory concerning a sentence enhancement cannot be deemed inconsistent with a jury verdict for purposes of overturning that verdict. (See **JURY**, §32-8(a)).

The jury's negative answer to a special interrogatory whether defendant personally discharged a firearm which proximately caused death – asked in order to obtain a sentence enhancement under [730 ILCS 5/5-8-1\(a\)\(1\)\(d\)](#) – cannot be used to challenge the jury's verdict convicting the defendant of first degree murder.

(Defendant was represented by Assistant Defender Nancy Vincent, Springfield.)

[Top](#)

§55-3

Multiple Convictions Based on the Same Conduct

§55-3(a)

General Rule

[Rutledge v. U.S., 517 U.S. 292, 116 S.Ct. 1241, 134 L.Ed.2d 419 \(1996\)](#) Defendant was convicted of two federal offenses - participating in a conspiracy to distribute a controlled substance and conducting a continuing criminal enterprise. The agreement that formed the basis for the conspiracy conviction was also an essential element of the CCE offense - that defendant acted "in concert with five or more other persons" in violating federal criminal laws. The trial court imposed concurrent life sentences for both offenses.

It was error to impose sentences on both counts. Courts may not impose greater punishment than was intended by the legislature; thus, even concurrent sentences on counts that contain common elements are permissible only if the legislature intended to authorize multiple sentences. Where the "in concert" element of a continuing criminal enterprise involves the same agreement already punished as conspiracy, the latter is a lesser included offense for which Congress did not intend multiple punishments.

[People v. King, 66 Ill.2d 551, 363 N.E.2d 838 \(1977\)](#) A defendant may not be convicted for more than one offense arising out of the same physical act. The Supreme Court rejected the "independent motivation" test as a standard for determining whether multiple convictions (with concurrent sentences) are permissible. Defendant's criminal objective or motivation is only relevant in determining whether consecutive sentences can be imposed.

"When more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses, convictions with concurrent sentences can be entered."

Convictions for both rape and burglary with intent to commit rape were affirmed. See also, [People v. Johnson, 128 Ill.2d 253, 538 N.E.2d 1118 \(1989\)](#); [People v. Turner, 128 Ill.2d 540, 531 N.E.2d 1196 \(1989\)](#).

[People v. Rodriguez, 169 Ill.2d 183, 661 N.E.2d 305 \(1996\)](#) Defendant was charged with eight counts of aggravated criminal sexual assault, including four based on displaying or threatening to use a dangerous weapon and four based on committing a sexual offense during a home invasion. Defendant was also charged with home invasion based upon a threat to use force or use of force while armed with a dangerous weapon.

The jury returned general verdicts convicting defendant of aggravated criminal sexual assault, home

invasion and intimidation. The evidence showed that after entering the bedroom of a 13-year-old girl, defendant committed sexual assaults while he brandished a handgun and made several threats. The trial court imposed consecutive 35-year sentences for aggravated criminal sexual assault and home invasion and a five-year sentence for intimidation.

Multiple "acts" were involved here. **King** defines an "act" as "any overt or outward manifestation which will support a different offense." Under this definition, the home invasion was based on the "act" of an unlawful entry to the complainant's home, while the aggravated criminal sexual assault was based on the "act" of sexual penetration. Thus, although the offenses shared a common act (i.e., threatening the victim with a gun), they were based on different "acts" for **King** purposes.

Because the offenses were based on multiple "acts," multiple convictions were proper so long as one was not a lesser included offense of the other. Under these circumstances, home invasion is not a lesser included offense of aggravated criminal sexual assault. Because defendant was convicted of aggravated criminal sexual assault in a general verdict, the conviction is presumed to have been based on any good count in the indictment to which the proof was applicable. One of the "good" counts for the sexual assault conviction alleged that defendant displayed or threatened to use the gun during sexual activity, a theory that posed no lesser included offense problems with home invasion based on an illegal entry. Thus, the convictions and sentences were proper.

[**People v. Segara**, 126 Ill.2d 70, 533 N.E.2d 802 \(1988\)](#) A defendant may be properly convicted of more than one offense arising out of the same transaction, unless the offenses involve precisely the same physical act. If exactly the same physical act forms the basis of more than one offense, defendant may only be convicted of one offense.

[**People v. Henry**, 204 Ill.2d 267, 789 N.E.2d 274 \(2003\)](#) Where defendant was acquitted of aggravated battery, his conviction for the lesser included offense of misdemeanor battery could not stand. An acquittal for an offense constitutes an acquittal of all included lesser offenses.

[**People v. Crespo**, 203 Ill.2d 335, 788 N.E.2d 1117 \(2001\)](#) Under [**People v. King**, 66 Ill.2d 551, 363 N.E.2d 838 \(1977\)](#), where more than one offense arises from a series of incidental or closely related acts and the offenses are not lesser included crimes, convictions with concurrent sentences can be entered on all the offenses.

Here, each of three stab wounds to the victim could have been the basis for a separate charge of armed violence or aggravated battery. However, both the indictment and the State's arguments at trial established that the prosecution did not differentiate between the three stab wounds, but instead based one count of armed violence and two counts of aggravated battery on different theories of culpability. It "would be profoundly unfair" to allow the State, on appeal, to "apportion the crimes among the various stab wounds" where it had not sought to do so in the charge or at trial.

[**People v. Bishop**, 218 Ill.2d 232, 843 N.E.2d 365 \(2006\)](#) Where defendant was charged with four counts of aggravated criminal sexual assault and four counts of criminal sexual assault, and in both the indictments and at trial the State focused on three acts of sexual penetration, no error occurred when defendant was convicted of three counts of aggravated criminal sexual assault.

Because the complainant became pregnant only once, however, defendant could be convicted of only one count of aggravated criminal sexual assault predicated on bodily harm by pregnancy.

Four counts of criminal sexual assault were clearly intended to be lesser included crimes of the four counts of aggravated criminal sexual assault. Therefore, convictions on the lesser charges were improper.

[**People v. Harvey**, 211 Ill.2d 368, 813 N.E.2d 181 \(2004\)](#) Where defendant was charged with four counts of unlawful possession of a stolen motor vehicle for possessing four separate vehicles and a separate count

of aggravated possession of all four stolen motor vehicles within one year, the aggravated offense was based upon the same physical act as the unlawful possession. Although the aggravated count required a finding that defendant possessed three or more stolen vehicles within one year, the time limitation was an additional element which did not change the underlying act.

The court reached the issue under the plain error rule. An "alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of the judicial process, thus satisfying the second prong of the plain error rule."

[People v. Artis, 232 Ill.2d 156, 902 N.E.2d 677 \(2009\)](#) Under [People v. King, 66 Ill.2d 551, 363 N.E.2d 838 \(1977\)](#) and [People v. Rodriguez, 169 Ill.2d 183, 661 N.E.2d 305 \(1996\)](#), multiple convictions cannot be based on a single physical act. Although the original rationale for the one-act, one-crime doctrine was the possibility of prejudice when seeking parole, the doctrine is also based on notions of fairness and the avoidance of prejudice in such matters as the setting of bond and sentencing. The court rejected the State's request to abolish the one-act, one-crime doctrine in light of the abolishment of parole under Illinois law.

Under the one-act, one-crime doctrine, a sentence should be imposed on the more serious offense, and the less serious offense should be vacated. In determining which offense is more serious, a reviewing court compares the relative punishments prescribed by the legislature for each offense.

Here the classifications of the offenses and authorized sentences were the same. Accordingly, the cause was remanded to the trial court to determine which conviction should be retained.

The State does not get to decide which of multiple offenses of the same legislative classification should be retained. Although the State has the power to nol-pros a charge throughout the trial proceedings, including at a sentencing hearing held on remand, the power to nol-pros does not extend to the appellate level. Thus, the State does not have the power to nol-pros one of the convictions once the case is on appeal.

[People v. Lee, 213 Ill.2d 218, 821 N.E.2d 307 \(2004\)](#) Where two convictions are based upon a single act, Illinois law holds that the less serious offense must be vacated. Whenever possible, determination of the "less serious offense" is to be based on the plain language of the statute and the General Assembly's classification of the offenses. Where the offenses in question carry the same classification, the trial court must determine, based on the mental states involved in each, which is more serious.

Where defendant was convicted of aggravated battery with a firearm (a Class X felony with a possible sentence of 6 to 30 years) and second degree murder (a Class 1 felony with a possible sentence of 4 to 20 years), the General Assembly determined that second degree murder was the less serious offense. That conclusion was not affected by the fact that in this particular case, the trial judge imposed a longer sentence for second degree murder than for aggravated battery with a firearm.

[People v. Sienkiewicz, 208 Ill.2d 1, 802 N.E.2d 767 \(2003\)](#) Under [Blockburger v. U.S., 284 U.S. 299 \(1932\)](#), a single act cannot be the subject of successive prosecutions under different statutes unless each statute requires proof of a fact which the other did not. In addition, because a lesser included offense requires no proof beyond that required for the greater offense, the prosecution of a lesser included offense prevents a subsequent prosecution for the greater offense.

Reckless driving is a lesser included offense of reckless homicide, and **Blockburger** therefore prohibits a prosecution for reckless homicide after defendant was convicted of reckless driving.

[People v. Quigley, 183 Ill.2d 1, 697 N.E.2d 735 \(1998\)](#) Defendant did not commit a misdemeanor DUI when he started his vehicle's engine and an aggravated DUI when he performed "some other act" that led to an accident. Both the felony and misdemeanor DUI offenses were based on the "continuing" act of driving a vehicle while under the influence of alcohol.

[People v. Smith, 183 Ill.2d 425, 701 N.E.2d 1097 \(1998\)](#) Defendant was convicted of felony murder

(predicated on armed robbery) and armed robbery. The armed robbery involved taking money from a cash register during a robbery of a Jiffy Lube Center. Defendant could not be convicted and sentenced on both felony murder and the underlying predicate offense of armed robbery.

Likewise, the felony murder could not be upheld by construing an uncharged attempt armed robbery of a safe in a different part of the building as the predicate offense. The State did not specifically charge defendant with attempt armed robbery of the safe, discuss any attempt armed robbery of the safe in closing arguments, seek jury instructions on attempt armed robbery, or at any time assert that defendant had committed an attempt armed robbery of the safe. Due process would be violated if attempt armed robbery was substituted for the armed robbery asserted in the trial court as the predicate for felony murder.

People v. Bowens, 307 Ill.App.3d 484, 718 N.E.2d 602 (1st Dist. 1999) It is improper to base multiple convictions on a single physical act. Where defendant commits multiple, closely related acts, convictions may not be entered for crimes that are lesser included offenses of other convictions on which judgment is entered. On the other hand, multiple convictions are permitted on separate acts so long as none of the crimes are lesser included offenses.

Defendant's convictions were not based on a single act, because defendant's conduct (stabbing the victim in the throat, pushing him to the ground, and kicking him) could be divided into "overt manifestations" sufficient to support different convictions. However, the trial court erred by entering convictions for both attempt murder and armed violence, despite the existence of separate acts, because under the "charging instrument" approach armed violence was a lesser included offense of attempt murder.

Where multiple convictions are improper, the court should impose a sentence on the more serious count and vacate the judgment on the less serious count. Although attempt murder and armed violence both carry Class X sentences, attempt murder is a more serious offense because it involves specific intent.

People v. Johnson, 387 Ill.App.3d 780, 901 N.E.2d 455 (3d Dist. 2009) The relative seriousness of offenses is a matter of legislative intent; the clearest indication of the legislature's intent is the classification level assigned to each offense. Unlawful possession of a weapon by a felon is a less serious offense than aggravated unlawful use of a weapon, although the former carries a higher maximum prison term. Unlawful possession of a weapon by a felon is a Class 3 felony (compared to a Class 2 for aggravated unlawful use of a weapon), is probationable (aggravated unlawful use of a weapon is non-probationable), and has a shorter MSR period.

People v. Finn, 316 Ill.App.3d 1139, 738 N.E.2d 952 (1st Dist. 2000) Under the "charging instrument" test, criminal sexual abuse was not a lesser included offense of attempt aggravated criminal sexual assault here. Also, Supreme Court Rule 615 does not permit a reviewing court to enter judgment on a lesser included offense of a charge on which defendant was acquitted.

People v. Fitzgerald, 313 Ill.App.3d 76, 728 N.E.2d 1271 (1st Dist. 2000) Under the "charging instrument" test, a crime is a lesser included offense if it is fairly described by the charging instrument. To be a lesser included offense, the "broad foundation" or "main outline" of the lesser charge must be set out by the charging instrument.

Here, aggravated battery was not a lesser included offense of home invasion. The home invasion charge stated that defendant "injured" two individuals, "kicked" his girlfriend and "punched" a friend. Because the indictment failed to allege an essential element of aggravated battery - that the victim suffered "great bodily harm" - the home invasion charge failed to set forth the "main outline" of aggravated battery.

People v. Poe, 385 Ill.App.3d 763, 896 N.E.2d 453 (3d Dist. 2008) The "charging instrument" approach, which is used to determine lesser included offenses for the purposes of instructing the jury and allowing convictions for uncharged offenses, does not apply when determining whether multiple convictions violate

the one-act, one-crime rule.

Burglary with intent to commit a theft and theft are not based on a single act; burglary is based on entering the premises with intent to commit a theft, and theft is based on committing a theft after the entry is complete. In addition, based on their statutory elements, neither burglary nor theft is a lesser-included offense of the other. Thus, convictions may be entered on both offenses, even if the theft was a lesser included offense for purposes of instructing the jury.

Cumulative Digest Case Summaries §55-3(a)

In re Samantha V., 234 Ill.2d 359, 917 N.E.2d 487 (2009)

The court reiterated that the “one-act, one-crime” rule applies in juvenile proceedings. (See **JUVENILE**, §§33-5(a), 33-9 & **WAIVER – PLAIN ERROR – HARMLESS ERROR**, §§56-1(a), 56-2(b)(6)(a).)

People v. Johnson, 237 Ill.2d 81, 927 N.E.2d 1179 (2010)

Under Illinois law, multiple convictions cannot be based on a single physical act. Under such circumstances, the conviction for the less serious offense must be vacated.

The comparative seriousness of two offenses is a matter of legislative intent, considering such factors as the felony classification of the offenses, the authorized sentencing ranges, the length of the mandatory supervised release terms, whether the offenses are probationable, the mental states involved, and the specificity with which each offense is defined. The court concluded that unlawful use of a weapon by a felon is a less serious offense than aggravated unlawful use of a weapon because it is: (1) probationable, (2) a Class 3 felony (compared to a Class 2), and (3) carries a lower mandatory supervised release term. The fact that the maximum authorized sentence for unlawful possession of a weapon by a felon is longer than the maximum authorized sentence for aggravated unlawful use of a weapon does not establish a legislative intent that the former is the less serious offense.

(Defendant was represented by Assistant Defender Melissa Maye, Ottawa.)

People v. Miller, 238 Ill.2d 161, 938 N.E.2d 498 (2010)

1. Under **People v. King, 66 Ill.2d 551, 363 N.E.2d 838 (1977)**, multiple convictions and sentences can be entered where the defendant is convicted of multiple offenses arising from a series of incidental or closely related acts, and none of the offenses are by definition lesser included offenses of any of the other offenses. The **King** doctrine requires a two-step analysis under which the court must first determine whether the defendant’s conduct involved a single or multiple acts. If only a single act was involved, only one conviction may be imposed.

If the conduct involved multiple acts, the court must then determine whether any of the offenses are lesser included offenses. If so, multiple convictions are improper.

2. Illinois courts have used three methods to determine whether one crime is a lesser included offense of another crime: (1) the “abstract elements” approach, under which the statutory elements of the offenses are compared; (2) the “charging instrument” approach, under which the charging instrument is examined to determine whether the description of the greater offense contains a “broad foundation” or “main outline” of the lesser offense; and (3) the “evidence” or “fact” approach, under which the court looks to the facts adduced at trial to determine whether proof of the greater offense necessarily establishes the lesser offense.

The court stated that where the issue is whether the jury should be instructed on an uncharged lesser included offense, the predominant concern is providing notice of the offenses of which a defendant may be convicted. Under these circumstances, the “charging instrument” approach is appropriate.

When determining whether multiple convictions may be entered for closely related acts, however, the defendant has notice of the possible convictions based on the charges. The “abstract elements” approach

is more appropriate for these purposes, because it permits defendants to be held accountable for the full measure of their conduct and resulting harm.

Thus, application of the “one act, one crime” doctrine is determined under the “abstract elements” test.

3. Because it is possible to commit burglary without necessarily committing retail theft, retail theft is not a lesser included offense under the abstract elements test. First, each offense contains unique elements not included in the other. Second, the mental states for the offenses differ; burglary requires intent to commit a felony or theft, while retail theft requires intent to deprive a merchant of possession, use or benefit of merchandise without paying the full retail value.

The court concluded that convictions for retail theft and burglary were proper under **King**. (Defendant was represented by Assistant Defender Deborah Pugh, Chicago.)

People v. Nunez, 236 Ill.2d 488, 925 N.E.2d 1083 (2010)

Defendant was convicted of one count of aggravated driving under the influence of a drug or combination of drugs while his driver’s license was suspended or revoked and one count of driving while his license was suspended or revoked. Defendant was sentenced to concurrent terms of two years imprisonment.

1. The court rejected the argument that the conviction for driving while license revoked must be vacated on one-act, one-crime principles. Under Illinois law, multiple convictions may not be based on a single physical act. Where convictions are based on multiple acts, however, the defendant is prejudiced only if some of the convictions are, by definition, lesser included offenses of other convictions.

2. When conducting a one-act, one-crime analysis, the court must first determine whether the defendant’s conduct consisted of one or several acts. If it is determined that the defendant committed multiple acts, the court must go on to determine whether any of the convictions are for lesser included offenses. If so, multiple convictions are improper.

3. Because the legislature has provided that the penalty for driving while license revoked for DUI “shall be in addition to the penalty imposed for any subsequent” DUI ([625 ILCS 5/11-501\(b\)\(1\), \(2\)](#)), it intended that sentences be imposed both for driving while license revoked and aggravated DUI. “Since we are aware of no constitutional principle contravened by the statute, the legislation’s intent must be given effect.”

4. The court rejected the argument that multiple convictions were improper because DWLR based on a previous DUI conviction is a lesser included offense of aggravated DUI. A lesser included offense is one that: (1) is composed of some but not all of the elements of the greater offense, and (2) has no element that is not included in the greater offense. The court concluded that having a revoked driver’s license is not an element of aggravated DUI, but merely a factor which enhances sentencing. Because aggravated DUI does not contain all of the elements of DWLR, therefore, the latter is not a lesser included offense of the former.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

In re Rodney S., 402 Ill.App.3d 272, 932 N.E.2d 588 (4th Dist. 2010)

Even if closely related, separate blows are separate acts that support multiple convictions, but only if the State treats them as separate acts at the trial level. If the State charges the multiple blows as a single physical act, multiple convictions are improper. **People v. Crespo, 203 Ill.2d 335, 788 N.E.2d 1117 (2001).**

In this case, the State could have but did not differentiate between the multiple blows struck by the respondent. Instead, it charged a series of acts in each count of two counts of aggravated battery. Therefore, the Appellate Court vacated one of the convictions.

(Defendant was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Bailey, 409 Ill.App.3d 574, 948 N.E.2d 690 (1st Dist. 2011)

Multiple convictions are improper if they are based on precisely the same physical act. If a defendant

is convicted of two offenses based on the same physical act, the conviction for the less serious offense must be vacated.

When a defendant has committed multiple acts, each capable of sustaining a separate conviction, the State can charge defendant either for each separate act or for the cumulative effect of the acts under multiple theories of the offense. But in order to sustain multiple convictions, the State must provide notice to the defendant in the charging instrument that it intends to treat the conduct of the defendant as multiple acts.

The defendant was convicted of multiple counts of financial exploitation of an elderly person. Two counts charged that defendant “knowingly and by deception obtained control over property,” of the victim, which the court construed to refer to her obtaining of a durable power of attorney from the victim. The court ordered that the counts charging that act should merge into the count charging the greater amount of money, as that was the more serious offense, even though both carried the same penalty.

Two other counts charged that defendant “knowingly and illegally used the assets or resources” of the victim, which the court construed to refer to her unauthorized taking of the victim’s savings. Although the evidence showed that multiple takings took place over a period of months, the State did not charge each taking as a separate act. Therefore, the State was not entitled to multiple convictions. The counts charging the act of taking merged into the count charging the greater amount of money, as that was the more serious offense, even though both carried the same penalty.

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

[People v. Betance-Lopez, 2015 IL App \(2d\) 130521 \(No. 2-13-0521, 2/27/15\)](#)

Defendant was convicted of two counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse. At sentencing, the trial court declined to impose a sentence for aggravated criminal sexual abuse, finding that the conviction merged with predatory criminal sexual assault of a child. On appeal, the State argued for the first time that the trial court incorrectly concluded that aggravated criminal sexual abuse was a lesser-included offense of predatory criminal sexual assault of a child and asked the court to remand the cause for sentencing on the former count.

The court acknowledged that where a criminal defendant appeals a conviction, the reviewing court has authority to grant the State’s request to remand for imposition of a sentence on a conviction that was improperly vacated under one-act, one-crime principles. However, the court concluded that defendant was prejudiced by the State’s failure to raise the issue in the trial court because he would be subject to mandatory consecutive sentencing if the State’s request was granted. Noting that defendant might have decided to not appeal had the State raised the issue below, the court declined to overlook the State’s waiver.

(Defendant was represented by Assistant Defender Yasmin Eken, Chicago.)

[People v. Bouchee, 2011 IL App \(2d\) 090542 \(No. 2-09-0542, 12/6/11\)](#)

1. Multiple convictions are prohibited where the offenses are carved from the same physical act or where, with regard to multiple acts, one of the offenses is a lesser-included offense of the other. To determine whether a charged offense is a lesser included of another charged offense for purposes of this rule, courts employ the abstract-elements approach. Under this approach, if all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second. [People v. Miller, 238 Ill.2d 161, 938 N.E.2d 498 \(2010\)](#). To satisfy the abstract-elements approach, it must be impossible to commit the greater offense without necessarily committing the lesser offense. Whether one charge is a lesser-included offense of the other is a legal question reviewed *de novo*.

2. Defendant was convicted of home invasion, in that he entered a dwelling and therein committed a criminal sexual assault, and criminal sexual assault. Under the abstract-elements approach, criminal sexual assault is not a lesser-included offense of home invasion because it is possible to commit home invasion without necessarily committing criminal sexual assault. A person can also commit home invasion under the charged subsection by entering and committing therein criminal sexual abuse. [720 ILCS 5/12-11\(a\)\(6\)](#).

The court rejected the argument that home invasion is analogous to felony murder, where the predicate felony is deemed to be a lesser-included offense of felony murder for purposes of the same-elements test employed for double-jeopardy purposes. Although the same-elements test is equivalent to the abstract-elements approach, unlike felony murder, it would contravene legislative intent to treat home invasion and its predicate felony as a single offense.

In the case of felony murder, the predicate felony supplies the mental state for first-degree murder. Therefore it can be safely assumed that the legislature did not intend to allow convictions for both the murder and the predicate felony. In contrast, the gravamen of home invasion is unauthorized entry, and that gravamen is complete when a person knowingly enters without authority, knowing that one or more persons is present. [720 ILCS 5/12-11\(a\)](#). Although home invasion also requires the subsequent commission of another offense, that offense is a discrete offense with its own elements and mental state.

Moreover, the predicate offense is not necessarily “lesser.” For instance, in the case of criminal sexual assault, the predicate offense could be subject to a extended-term penalty greater than that available for home invasion. Because it must be presumed that the legislature did not intend to create an absurdity or an injustice, it cannot be presumed that the legislature intended that a person could commit the gravamen of home invasion, and receive punishment for the same, but receive no punishment for even a more serious offense that he commits inside.

Because criminal sexual assault is not a lesser-included offense of home invasion, both convictions stand.

(Defendant was represented by Assistant Defender Darren Miller, Elgin.)

[People v. Clark, 2014 IL App \(1st\) 123494 \(No. 1-12-3494, 11/20/14\)](#)

1. A defendant has a due process right to notice of the charges brought against him. A defendant may be convicted of an uncharged offense only if that crime is a lesser included offense of a crime with which the defendant is expressly charged. The charging instrument approach is used to determine whether an uncharged crime is a lesser-included offense.

Under this approach, the court looks first to the allegations of the charging instrument to see whether the description of the greater offense contains the broad foundation or main outline of the lesser offense. Every element of the lesser offense need not be explicitly contained in the greater charge, so long as the missing elements can be reasonably inferred. If the description of the greater offense contains the broad foundation of the lesser offense, the defendant may be convicted of the lesser offense if the evidence presented at trial rationally supports a conviction on that offense.

[720 ILCS 5/18-4\(a\)](#) provides alternative methods of committing aggravated vehicular hijacking: (1) by taking a motor vehicle from the person or immediate presence of another by the use or threat of immediate force while armed “with a dangerous weapon, other than a firearm,” ([720 ILCS 5/18-4\(a\)\(3\)](#)), or (2) by taking a motor vehicle from the person or immediate presence of another by the use or threat of immediate force while armed “with a firearm.” ([720 ILCS 5/18-4\(a\)\(4\)](#)). Similarly, armed robbery is defined as: (1) knowingly taking property other than a vehicle from the person or the presence of another by the use or threat of imminent force while armed with “a dangerous weapon, other than a firearm” ([720 ILCS 5/18-2\(a\)\(1\)](#)), or (2) knowingly taking property other than a vehicle from the person or the presence of another by the use or threat of imminent force while armed with “a firearm.” ([720 ILCS 5/18-2\(a\)\(1\)](#)). Thus, the statutes create mutually exclusive forms of armed robbery and aggravated vehicular hijacking depending on the nature of the weapon used.

Because the offenses are mutually exclusive, charging one offense does not allege the basic outlines of the alternative offenses. In other words, the allegation that defendant was armed with a firearm necessarily excluded an allegation that he was armed with a dangerous weapon other than a firearm. Furthermore, none of the language in the charging instrument implies that defendant was armed with a weapon other than a firearm or that he used a firearm as a bludgeon. Therefore, aggravated vehicular hijacking with a dangerous weapon other than a firearm and armed robbery with a dangerous weapon other than a firearm were not lesser

included offenses of aggravated vehicular hijacking with a firearm and armed robbery with a firearm.

2. The court concluded that entering judgment on offenses that were not lesser-included offenses of charged offenses constitutes plain error under the second prong of the plain error rule, which applies to clear and obvious errors which are so serious as to affect the reliability of the trial and challenge the integrity of the judicial process.

The convictions were reduced to vehicular hijacking and robbery and the cause was remanded for re-sentencing.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

People v. Fuller, 2013 IL App (3d) 110391 (No. 3-11-0391, 5/30/13)

1. When multiple charges arise from the same act, the defendant may be convicted and sentenced for the most serious offense. Where multiple charges arise from multiple acts, the court must determine whether any other offenses are lesser included offenses. If so, multiple convictions are improper.

Defendant was convicted of home invasion and criminal sexual assault, and argued that criminal sexual assault was a lesser included offense of home invasion and therefore could not be the subject of a separate conviction.

Illinois courts have identified three methods for determining whether one crime is a lesser included offense of another offense: (1) the “charging instrument” approach, (2) the “abstract elements” approach, and (3) the “facts or evidence adduced at trial” approach. In [People v. Miller, 238 Ill.2d 161, 938 N.E.2d 498 \(2010\)](#), the Supreme Court held that the “abstract elements” approach governs whether a charged offense is a lesser included crime of another charged offense.

Under the abstract elements approach, if all of the elements of one offense are included in the second offense, and the first offense contains no element that is not also an element of the second offense, the first offense is a lesser included offense of the second crime. In other words, a crime is a lesser included offense if it is impossible to commit the greater offense without committing the lesser offense.

Home invasion is committed where one: (1) knowingly enters the dwelling place of another with reason to know that persons are present, and (2) intentionally causes injury, uses force or threatens to use force while armed with a dangerous weapon, personally discharges a firearm that causes great bodily harm or death, uses force or threatens to use force while discharging a firearm, or commits any of several specified sex offenses against a person in the dwelling. The court concluded that because it is possible to commit home invasion without necessarily committing criminal sexual assault, criminal sexual assault is not a lesser included offense of home invasion where both offenses are charged. The court added that even if only the sex offense provision of the home invasion statute is considered, home invasion may occur by the commission of sex offenses other than criminal sexual assault. Therefore, where both offenses are charged and the abstract elements test applies, criminal sexual assault is not a lesser included offense of home invasion.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Gillespie, 2014 IL App (4th) 121146 (No. 4-12-1146, 12/22/14)

1. Under [People v. King, 66 IL 2d 551, 363 N.E.2d 838 \(1977\)](#), where more than one offense arises from a series of closely related acts and the offenses are not by definition lesser-included offenses, convictions with concurrent sentences can be entered on all of the offenses. Although the Illinois Supreme Court has identified three possible methods for determining whether one offense is a lesser-included offense of another, the appropriate test for **King** purposes is the abstract elements test. Under this test, a crime is a lesser-included offense if all of its elements are included within a second offense and it contains no element not included in the second offense.

For there to be a lesser included offense under the abstract elements test, it must be impossible to commit the greater offense without also committing the lesser offense. The abstract elements approach does not consider the facts of a crime as charged in the particular charging instrument or as proved at trial.

2. Defendant was convicted of robbery and aggravated criminal sexual assault based on committing a criminal sexual assault during the commission of a felony. The predicate felony for the aggravated criminal sexual assault was the same robbery for which defendant was convicted.

The court concluded that under Illinois law, the predicate offense for a crime is necessarily a lesser-included offense of that crime. Thus, where robbery is the predicate offense for aggravated criminal sexual assault, robbery is by definition a lesser-included offense. The robbery conviction was vacated.

(Defendant was represented by Supervisor Marty Ryan, Springfield.)

People v. Hagler, 402 Ill.App.3d 149, 937 N.E.2d 204 (2d Dist. 2010)

Multiple convictions are improper if based on the same physical act. If a common act is part of both offenses, or part of one offense and the only act of another, multiple convictions can stand. The key question is whether there is a separate act that will support a different offense.

Defendant was convicted of aggravated battery of a peace officer and resisting a peace officer, proximately causing injury to the officer. Both charges alleged an injury to the officer that occurred when defendant slammed a door on the officer, causing the officer's hand and arm to go through a glass pane on the door. The slamming of the door was the only act that formed the basis for the aggravated battery charge. The Appellate Court rejected the State's argument that the defendant's act of running when instructed by the officer to stop was a separate act that supported the resisting conviction. Because the resisting statute ([720 ILCS 5/31-1\(a-7\)](#)) requires that the act of resisting be the proximate cause of the injury to the officer in order to impose a Class 4 sentence, there was only one act that formed the basis for both charges.

The court vacated defendant's conviction for resisting a peace officer proximately causing injury, which is a less serious offense (Class 4 felony) than aggravated battery to an officer (Class 2 felony).

(Defendant was represented by Assistant Defender John Hildebrand, Elgin.)

People v. Jimerson, 404 Ill.App.3d 621, 936 N.E.2d 749 (1st Dist. 2010)

A defendant may not be convicted of multiple offenses based on the same physical act. An "act" is any overt outward manifestation supporting a different offense, even though closely related. If the charging instrument does not differentiate between the closely-related acts, multiple convictions cannot stand. It is unfair to allow the State on appeal to apportion the crimes among the various acts where it had not sought to do so at trial.

Where the evidence at trial proved that defendant and his accomplices struck correctional officers multiple times, convictions for both mob action and aggravated battery could stand. The State proceeded at trial on the theory that the multiple strikes were separate acts.

(Defendant was represented by Assistant Defender Jessica Hunter, Chicago.)

People v. Koter, 2012 IL App (1st) 100951 (No. 1-10-0951, 9/28/12)

1. The "one act, one crime" doctrine prohibits multiple convictions based on a single physical act. If a defendant commits multiple acts, however, multiple convictions may stand provided that none of the offenses are lesser included offenses. An "act" is "any overt or outward manifestation which will support a different offense."

Whether a defendant was improperly convicted of multiple offenses arising from a single act, and whether charges are lesser included offenses, are questions of law that are reviewed *de novo*.

2. Where the defendant was convicted of five counts of theft for obtaining control over money belonging to the village which employed him as a parking enforcement officer and one count of official misconduct over a period of time which encompassed all five of the thefts, the court concluded that the single charge of official misconduct was based on the same physical act as the five thefts. Therefore, it was error to enter convictions on all of the offenses.

3. Where multiple convictions are improperly imposed, a sentence is to be imposed on the most serious offense and the convictions for the less serious offenses vacated. Because theft of government

property as charged was a Class 2 felony and official misconduct was a Class 3 felony, the official misconduct conviction must be vacated. The convictions for five counts of theft were affirmed.

(Defendant was represented by Assistant Defender Kieran Wiberg, Chicago.)

People v. McFadden, 2014 IL App (1st) 102939 (No. 1-10-2939, 2/4/14)

As a matter of plain error, the court found that multiple convictions for unlawful use of a weapon by a felon were improper under the one-act, one-crime doctrine, which precludes multiple convictions based on precisely the same physical act or where one of the offenses is a lesser included offense of the other. For purposes of the doctrine, an “act” is any overt or outward manifestation which will support a different offense.

Defendant was convicted of three counts of armed robbery and two counts of unlawful use of a weapon by a felon arising from the commission of armed robberies against separate victims over a 24-hour-period. The UUW by a felon convictions involved defendant’s possession of a single weapon during two of the three robberies.

Noting that the UUW by a felon statute criminalizes possession rather than use of a weapon, the court concluded that a “singular and continuous” act of possession occurring over a several-hour period constitutes a single act for purposes of the one-act, one crime doctrine. Because the legislature is presumed to not have intended absurd results, the court concluded that the legislative intent of the UUW by a felon statute was to permit only one conviction for the continuous possession of a firearm, even where that firearm is used in the commission of several offenses during a single chain of events. Otherwise, “a potentially infinite number of convictions” could occur because “the defendant possessed the firearm from hour to hour, minute to minute, nanosecond to nanosecond.”

The court vacated one of defendant’s convictions for unlawful use of a weapon by a felon.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. McSwain, 2012 IL App (4th) 100619 (No. 4-10-0619, 1/18/12)

If a statute permits multiple convictions for simultaneous possession, the one-act, one-crime doctrine applies. When construing whether a statute permits multiple convictions, a court is required to ascertain and give effect to the intent of the legislature. the most reliable indicator of legislative intent is the plain language of the statute, which, if plain and unambiguous, must be read without exception, limitation, or other condition. Criminal statutes must be strictly construed in the defendant’s favor.

The child pornography statute provides that a person commits child pornography who “with knowledge of the nature and content thereof, possesses *any* film, videotape, photograph or similar visual reproduction or depiction of any child . . . whom the person knows or reasonably should know to be under the age of 18 . . . engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection.” 720 ILCS 5/11-20.1(a)(6) (emphasis added).

The term “any” in the statute could be singular or plural, as it can mean “any one of a kind,” “any kind,” or “any number.” The term “any” thus does not adequately define the allowable unit of prosecution for a child pornography offense. The statute is therefore ambiguous and must be construed in favor of the defendant. Consequently, the simultaneous possession of multiple images cannot support multiple convictions.

While agreeing with the State that each photograph exploits the minor and adds to the market, the court held that it is for the legislature to define what it desires to make an allowable unit of prosecution. By its amendment of other statutes, the legislature has demonstrated that it knows how to authorize multiple convictions for simultaneous violations of a single statute. The legislature can amend the statute if it wants to authorize multiple convictions based on simultaneous possession of different images of child pornography.

As defendant was convicted of five counts of child pornography based on his receipt of an email that displayed five photos within the body of that email, the court vacated convictions on four of those counts.

(Defendant was represented by Assistant Defender Jacqueline Bullard, Springfield.)

[People v. Patrick, 406 Ill.App.3d 548, 956 N.E.2d 443 \(2d Dist. 2010\)](#)

A defendant may not be convicted of or sentenced for more than one offense carved from a single physical act. “Act” means any overt or outward manifestation that would support a different offense.

The offense of leaving the scene of an accident involving death or injury contemplates that there may be several persons injured in an accident, but focuses on the duty of the driver to remain on the scene to provide information and assistance. [625 ILCS 5/11-401\(a\)](#). Therefore, defendant may not be convicted and sentenced for more than one offense of leaving the scene of an accident where there is only one accident scene, despite the number of persons injured or killed by the accident.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

[People v. Pittman, 2014 IL App \(1st\) 123499 \(No. 1-12-3499, 12/23/14\)](#)

The simultaneous possession of different types of controlled substances will not support more than one conviction and sentence unless the statute expressly authorizes multiple convictions. [People v. Manning, 71 Ill.2d 132, 374 N.E.2d 200 \(1978\)](#). Where defendant threw 1.8 grams of heroin into a garbage can as he was fleeing police, and after his arrest led police to an additional 3.1 grams of heroin concealed in the wheel well of a boat located in an adjacent vacant lot, the court found that defendant engaged in separate rather than simultaneous acts of possession.

An “act” is any overt or outward manifestation which will support a different offense. Here, there was evidence to support a finding of an act of actual possession of the heroin which defendant discarded while fleeing the police. In addition, there was separate evidence of an independent act of constructive possession of the heroin found in the boat. Under these circumstances, two acts of possession occurred.

Even where more than one act occurred, multiple convictions are permitted only if the State apportioned each act to separate charges in the indictment or information. That requirement was satisfied here, because the State charged separate offenses based on the separate acts.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

[People v. Price, 2011 IL App \(4th\) 100311 \(No. 4-10-0311, 9/16/11\)](#)

1. Under [People v. King, 66 Ill.2d 551, 363 N.E.2d 838 \(1977\)](#), a defendant may not be convicted of multiple offenses based on precisely the same act. An “act” is “any overt or outward manifestation which will support a different offense.” So long as offenses consist of multiple acts under **King**, a defendant may be convicted of two offenses which share a common act, unless one of the offenses is a lesser included offense of the other. [People v. Rodriguez, 169 Ill.2d 183, 661 N.E.2d 305 \(1996\)](#).

2. The court found that convictions of residential burglary and home invasion share a common act – an act of entry – but that home invasion requires the additional act of causing injury to a resident. The **Rodriguez** rule applies, therefore, and both convictions may stand. Because the defendant did not argue that residential burglary was included in home invasion, the court found that it need not determine whether residential burglary is a lesser included offense of home invasion.

3. The court acknowledged that in [People v. McLaurin, 184 Ill.2d 58, 703 N.E.2d 11 \(1988\)](#), the Supreme Court vacated a residential burglary conviction after finding that home invasion and residential burglary were based on the same physical act of entering the dwelling of the victim. The court also acknowledged that several Appellate Courts have vacated residential burglary convictions based on **McLaurin**. The court noted, however, that **McLaurin** did not discuss the applicability of **Rodriguez** or “the fact the home-invasion offense required the additional physical act of causing injury to a person in the dwelling.” The court also noted that **McLaurin** also held that convictions could be entered for both intentional murder and home invasion which shared a common act - setting a fire - because home invasion required the additional act of entry to the victim’s residence. The court concluded that applying both **Rodriguez** and **McLaurin**, defendant’s convictions of home invasion and residential burglary should both be affirmed.

(Defendant was represented by Assistant Defender Michael Vonnahmen, Springfield.)

People v. Ramirez, 2012 Il App (1st) 093504 (No. 1-09-3504, 8/15/12)

Under the one-act, one-crime doctrine, a court shall not impose multiple convictions where multiple offenses are carved from the same physical act. Even where there are arguably separate acts, separate convictions cannot be sustained where the prosecution does not charge the acts as separate offenses.

A person commits bribery when with the intent to influence the performance of any act related to the employment or function of a public employee, he promises or tenders to that employee property or personal advantage which the employee would not be authorized by law to accept. [720 ILCS 5/33-1\(b\)](#). The act of bribery is complete as of the promise where it is given with the requisite intent.

Defendant could be convicted of only one count of bribery based on evidence that he promised to pay a city employee a sum of money to delete four building code violations from the city's computer system, and tendered the employee money in payment on that promise on two separate dates. The act of bribery was complete when defendant promised to pay the sum of money. He could not be convicted of a separate act of bribery for his subsequent tender of a portion of that sum. The State could have charged defendant with multiple acts of bribery for the promises made with respect to the separate building code violations, but because it charged him with only one count of bribery for his actions on the date that he reached the agreement, it could obtain but one conviction.

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

People v. Sanchez, 2014 IL App (1st) 120514 (No. 1-12-0514, 2/26/14)

Although a defendant generally may not be convicted of an uncharged offense, a reviewing court may enter judgment on a lesser-included offense even where the lesser offense was not charged at trial. Courts use the charging instrument approach to determine whether to enter judgment on the lesser offense. Under this test, the court first examines the indictment and determines whether the factual allegations provide a broad foundation or main outline of the lesser offense. The court then considers whether the trial evidence was sufficient to uphold conviction on the lesser offense.

1. Defendant was charged with aggravated battery of a peace officer but convicted by a jury of resisting a peace officer. Aggravated battery of a peace officer is defined as striking a person known to be an officer engaged in the performance of his duties. [720 ILCS 5/12-4\(b\)\(1\)](#). Resisting a peace officer is defined as knowingly resisting or obstructing the performance of any authorized act of a known officer. [720 ILCS 5/31-1\(a\)](#). The information charged that defendant intentionally and knowingly caused bodily harm to a police officer while the officer was performing his official duties.

Since both offenses require that a defendant act with knowledge that he is striking or resisting an officer acting in his official capacity, the information charging aggravated battery broadly defined the offense of resisting a peace officer.

2. The evidence also supported the conviction for resisting a peace officer. Although the officer was not attempting to arrest defendant when he was struck, he was still engaged in the authorized act of trying to interview a potential witness. The State's witnesses testified that the police legally entered the home to interview defendant. The officers woke defendant up and identified themselves before defendant jumped up and punched one of the officers. Based on this evidence, a reasonable jury could have concluded that the defendant resisted an authorized act of the officer when he punched him in the chest.

(Defendant was represented by Assistant Defender Kate Schwartz, Chicago.)

People v. Schmidt, 405 Ill.App.3d 474, 938 N.E.2d 559 (3d Dist. 2010)

Multiple convictions and sentences can be entered where the defendant is convicted of multiple offenses arising from a series of incidental or closely related acts, and none of the offenses are by definition lesser included offenses of any of the other charges. Determining whether multiple convictions are permissible requires a two-step analysis under which the court must first determine whether the defendant's conduct involved a single or multiple acts. If a single act was involved, only one conviction may be imposed.

If the conduct involved multiple acts, the court must also determine whether any of the offenses are

lesser included offenses. If so, multiple convictions are improper. The “abstract elements” test is used to determine whether a crime is a lesser included offense.

Here, defendant was convicted of unlawful use of property to commit a methamphetamine violation, possession of methamphetamine, and possession of a methamphetamine precursor. The convictions were based on three acts: possession of methamphetamine, possession of pseudoephedrine, and using a vehicle to possess methamphetamine. Thus, multiple convictions were permissible unless any of the charges were lesser included offenses.

As a matter of plain error, the court concluded that possession of methamphetamine was an included offense of unlawful use of property. Defendant was charged with unlawful use of property for knowingly using his personal vehicle to possess methamphetamine. Because all of the elements of possession of methamphetamine are required to commit the offense of unlawful use of property to possess methamphetamine, the possession offense was vacated.

However, the court rejected the State’s confession of error that possession of a methamphetamine precursor was also a lesser included offense of unlawful use of property. The jury instructions showed that the unlawful use of property charge was based on the defendant’s use of his vehicle to possess methamphetamine, not on the possession of pseudoephedrine. Thus, under the State’s theory of the case, the elements of possession of a methamphetamine precursor were not included in the unlawful use of property charge.

The conviction for possession of methamphetamine was vacated. The cause was remanded for resentencing.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

[People v. Sedelsky, 2013 IL App \(2d\) 111042 \(No. 2-11-1042, 9/26/13\)](#)

Statutory construction requires a court to ascertain and give effect to the intent of the legislature. The most reliable indicator of legislative intent is the language of the statute, which, if plain and unambiguous, must be read without exception, limitation, or condition. Criminal statutes must be strictly construed in defendant’s favor.

The “allowable unit of prosecution” as defined by statute governs whether a particular course of conduct involves one or more distinct offenses under the statute.

Defendant was convicted and sentenced for two counts of possession of child pornography based on his possession of duplicate identical images uploaded at nearly the same time and stored in the same digital medium, but under different file names.

The child pornography statute proscribes possession of “any *** depiction by computer” of a pornographic image of a child. [720 ILCS 5/11-20.1\(a\)\(6\)](#). “Any” is not defined by statute and can mean singular or plural. Because “any” does not indicate whether the possession of duplicate depictions by computer in the same digital medium constitute separate offenses, the statute must be construed in defendant’s favor. Therefore, only one conviction of possessing child pornography can be entered for defendant’s possession of the same digital image stored in the same digital medium.

Because this holding applies only to the narrow facts presented, it does not conflict with the purpose of the child pornography statute, which is to “dry up” the pornography market. An individual possessing two duplicate digital images saved in the same medium cannot disseminate the image more widely than an individual possessing a single digital image. The images were not stored in different locations and could only be accessed through defendant’s account.

(Defendant was represented by Assistant Defender Steven Wiltgen, Elgin.)

[People v. Sotelo, 2012 IL App \(2d\) 101046 \(No. 2-10-1046, 3/29/12\)](#)

[430 ILCS 65/2\(a\)](#) defines the offenses of unlawful possession of a firearm and unlawful possession of ammunition:

(a)(1) No person may acquire or possess any firearm, stun gun, or taser . .

. without having in his possession a [FOID] card. . . .

(2) No person may acquire or possess firearm ammunition within this State without having in his or her possession a [FOID] card.

1. Under [People v. King, 66 Ill. 2d 551, 363 N.E.2d 838 \(1977\)](#), multiple convictions are prohibited for offenses carved from a single physical act or, with regard to multiple acts, where one of the offenses is a lesser included offense of the other. However, **King** does not prohibit multiple convictions for the simultaneous possession of multiple firearms without an FOID card. Although the “singular act of failing to possess a FOID card could not sustain multiple convictions of an offense comprised *solely of that act*, failing to possess a FOID card may serve as a common element of multiple offenses that include additional physical acts - possession of different firearms, or of firearm ammunition.”

2. However, the court concluded that the General Assembly did not intend to authorize multiple convictions for the simultaneous possession of multiple weapons without an FOID card. In determining whether the legislature intended to permit multiple convictions, the court is required to determine the “allowable unit of prosecution” for [§65/2\(a\)](#). Where a statute is ambiguous as to the allowable unit of prosecution, the court “must adopt a construction which favors the defendant.”

In [People v. Carter, 213 Ill. 2d 295, 821 N.E.2d 233 \(2004\)](#), the Illinois Supreme Court concluded that a statute which prohibited the possession of “any firearm or any firearm ammunition” was ambiguous because it could be read as providing either that the possession of each firearm constituted a separate offense, or as providing that the simultaneous possession of multiple firearms and ammunition constitute only a single offense. Because the statute was ambiguous, the **Carter** court adopted an interpretation that favored the defendant and held that the simultaneous possession of multiple firearms and ammunition constituted only a single offense.

The court reached the same conclusion concerning [§65/2\(a\)\(1\)](#), which uses similar language to the statute in **Carter**. Thus, because the legislature did not intend that the simultaneous possession of multiple firearms constitutes multiple violations of [§65/2\(a\)\(1\)](#), two of three of defendant’s convictions under (a)(1) must be vacated.

The court reached the opposite conclusion concerning the possession of ammunition, however. The court concluded that had the General Assembly intended the simultaneous possession of firearms and ammunition to constitute a single unit of prosecution, it would have placed the firearms and ammunition provisions in a single statute rather than in two separate subsections. The court concluded that the structure of §65(a) showed that the General Assembly intended to permit separate convictions for possession of firearms without a FOID card and possession of ammunition without a FOID card. Thus, defendant’s conviction for possession of ammunition was affirmed.

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

People v. Stanford, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-09-0420, 6/16/11)

Prejudice results to defendant where more than one offense is carved from the same physical act. With respect to multiple acts, defendant suffers prejudice when he is convicted of more than one offense, some of which are by definition lesser-included offenses. Multiple convictions based on several acts cannot stand when the charging instrument treats the defendant’s multiple acts as a separate act.

When the issue is whether one offense is a lesser-included offense of the other under the one-act, one-crime rule, the abstract elements approach is followed. Under this approach, a comparison is made of the statutory elements of two offenses. If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second. In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense.

Defendant was convicted of attempt murder and armed violence based on aggravated battery. Defendant admitted that separate injuries to the complainant’s head and both ankles resulted from three

separate acts. The court rejected the argument that the charging instrument treated the defendant's separate acts as a single act where the three armed violence counts differentiated between the injuries that the complainant suffered, even though the attempt murder charge did not. The prosecutor's argument that defendant's intent to kill was established by his firing multiple shots did not reflect a theory of the case that the shots constituted a single act. Therefore, defendant's convictions for attempt murder and armed violence were not based on one physical act.

Applying the abstract elements approach, defendant's armed violence conviction was not a lesser included of the attempt murder conviction. All of the elements of armed violence based on aggravated battery alleging great bodily harm are not included in the offense of attempt murder. Armed violence requires that defendant personally discharge a firearm that is a category I or II weapon, whereas attempt murder does not. Armed violence predicated on aggravated battery requires infliction of great bodily harm, while attempt murder does not. Because it is possible to commit attempt murder without committing armed violence, armed violence is not a lesser included of attempt murder.

(Defendant was represented by Assistant Defender Kathleen Weck, Elgin.)

People v. Stull, 2014 IL App (4th) 120704 (4-12-0704, 2/21/14)

1. Under **People v. King, 66 Ill. 2d 551, 363 N.E.2d 838 (1977)**, a criminal defendant may not be convicted of multiple counts arising from a series of incidental or closely related acts, or where any of the offenses are by definition lesser included offenses of any of the other offenses. Three tests have been used to determine whether one crime is a lesser included offense of another: (1) the "abstract elements" approach, under which the statutory elements of the offenses are compared; (2) the "charging instrument" approach, under which the charging instrument is examined to determine whether the description of the greater offense contains a "broad foundation" or "main outline" of the lesser charge; and (3) the "evidence" or "fact" approach, under which the court looks to the facts adduced at trial to determine whether proof of the greater offense necessarily establishes the lesser offense.

2. When determining whether the jury should be instructed on an uncharged lesser included offense, the predominant concern is providing notice of the offenses of which a defendant may be convicted. Under these circumstances, the "charging instrument" approach is used.

However, when determining whether multiple convictions may be entered under **King**, the defendant has notice of the possible convictions based on the charges. In this situation, the "abstract elements" approach is more appropriate because it permits defendants to be held accountable for the full measure of their conduct and the harm caused. For purposes of **King**, therefore, application of the "one act, one crime" doctrine is determined under the "abstract elements" test. (**People v. Miller, 238 Ill. 2d 161, 938 N.E.2d 498 (2010)**).

3. Under the abstract elements approach, the statutory elements of the two offenses in question are compared. If all of the elements of one offense are included within the second offense, and the first offense contains no element not included in the second offense, the first offense is a lesser included of the second. The "statutory elements" approach is easily stated and applied, and results in a lesser included offense only where it is impossible to commit the greater offense without necessarily committing the lesser offense.

The court concluded that under the statutory elements test, aggravated criminal sexual abuse is not a lesser included offense of predatory criminal sexual assault of a child. Predatory criminal sexual assault of a child occurs where a person who is over the age of 17 commits an act of sexual penetration with a person who is under the age of 13. Aggravated criminal sexual abuse occurs where a "family member" commits an act of "sexual conduct" with a person who is under the age of 18. As relevant here, "sexual conduct" means the intentional or knowing touching or fondling of any part of the body of a child under the age of 13 for purposes of sexual gratification or arousal.

Because predatory criminal sexual assault of a child requires an act of sexual penetration, and aggravated criminal sexual abuse does not require penetration but does require a familial relationship, under the abstract elements test aggravated criminal sexual abuse is not a lesser included offense of predatory

criminal sexual assault. Because defendant's conviction for aggravated criminal sexual abuse did not violate the one-act one-crime rule, the conviction was affirmed.

(Defendant was represented by Assistant Defender, Colleen Morgan, Springfield.)

[People v. Whalum, 2012 IL App \(1st\) 110959 \(No. 1-11-0959, 12/24/12\)](#)

Although a written order is evidence of the judgment of the circuit court, the judge's oral pronouncement is the judgment of the court. When the oral pronouncement and the written order conflict, the oral pronouncement controls.

The mittimus showed that the defendant was convicted of two counts of UUW by a felon. The judge's oral pronouncement was that the two counts merged, but he also stated, "That's a concurrent sentence on both counts." When the judge imposed sentence, he stated, "This sentence, on this case, will be ten years in the Illinois Department of Corrections."

The judge's oral pronouncement that the two counts merged controlled. Although the judge immediately contradicted himself by referring to "both counts," he imposed a single sentence without mention of counts or concurrent sentences. Therefore, the Appellate Court ordered that the mittimus be corrected to reflect a single conviction.

(Defendant was represented by Assistant Defender Jeffrey Svehla, Chicago.)

[Top](#)

§55-3(b)

Multiple Convictions Upheld

[Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 \(1983\)](#) Double jeopardy does not prohibit conviction and sentence on both armed robbery and armed criminal action (committing a felony while armed with a deadly weapon) at a single trial. Where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether such statutes proscribe the same conduct, the prosecution may seek, and the court may impose, cumulative punishments.

[People v. Kuntu, 196 Ill.2d 105, 752 N.E.2d 380 \(2001\)](#) Where multiple murder convictions are entered for a single victim, the conviction for the most culpable charge will be upheld and the convictions for less culpable charges vacated. However, where defendant was convicted of both murder and aggravated arson, but different victims were named for each offense, the aggravated arson convictions need not be vacated although the State alleged that the murders occurred in the course of the aggravated arson.

[People v. DelPercio, 105 Ill.2d 372, 475 N.E.2d 528 \(1985\)](#) Convictions of attempt armed robbery and conspiracy to commit armed robbery were proper. Each had a different factual basis. "The acts in furtherance of the conspiracy were procuring the shotgun and tape and knocking on the door, while the substantial step [for the attempt] was the threat of the imminent use of force and pointing the shotgun at [the victim]."

[People v. Stroner, 96 Ill.2d 204, 449 N.E.2d 1326 \(1983\)](#) Convictions for solicitation to commit murder, conspiracy to commit murder and attempt murder were affirmed. Solicitation was not a lesser included offense of conspiracy and conspiracy was not a lesser included offense of attempt murder.

[People v. Smith, 78 Ill.2d 298, 399 N.E.2d 1289 \(1980\)](#) Defendant convicted of both robbery and intimidation was not entitled to have the latter conviction vacated on the ground that it was a lesser included offense. In order to be classified as a lesser included offense, all of the elements of the lesser offense must

be included within the greater. Intimidation requires specific intent to cause another to perform or omit to perform certain acts, but robbery requires no specific intent. Since intimidation requires proof of an element that is not required for robbery, it is not a lesser included offense of robbery.

[**People v. Myers**, 85 Ill.2d 281, 426 N.E.2d 535 \(1981\)](#) Defendant was convicted of armed violence (based upon aggravated battery) and attempt murder for the stabbing of the complainant, and received concurrent sentences. The convictions and sentences were proper because more than one physical act was involved where defendant stabbed the complainant in the throat, moved the knife and cut a third party, and then returned the knife to the complainant's throat.

[**People v. Johnson**, 128 Ill.2d 253, 538 N.E.2d 1118 \(1989\)](#) Defendant was properly convicted of both armed violence and attempt murder arising out of the same incident because there were "two separate physical acts [two gunshots] sufficient to support each conviction . . . along with a number of events intervening between the two acts."

[**People v. Butler**, 64 Ill.2d 485, 356 N.E.2d 350 \(1976\)](#) Where defendant and a codefendant robbed two persons in a car, defendant holding a knife and taking money from one person and the codefendant holding the gun and taking money from the other, it was proper for defendant to be convicted of two armed robberies.

[**People v. Thomas**, 67 Ill.2d 388, 367 N.E.2d 1281 \(1977\)](#) Defendant was properly convicted of five counts of armed robbery, occurring during a single incident, against five victims.

[**People v. Canale**, 52 Ill.2d 107, 285 N.E.2d 133 \(1972\)](#) Where defendant drove the victim some distance from her home, confined her for 45 minutes and raped her, it was proper to convict of both aggravated kidnapping and rape.

[**People v. Eyler**, 133 Ill.2d 173, 549 N.E.2d 268 \(1989\)](#) Convictions for both murder and aggravated kidnapping were upheld.

The cause of death was stab wounds to the back, but there were also 14 additional puncture wounds and blows to the right eye and the left side of the face. Thus, the aggravated kidnapping was supported by evidence independent of the murder.

Also, generally an aggravated kidnapping conviction should not be sustained where the confinement constitutes technical compliance with the statutory definition but is in reality incidental to another offense. Here, however, the confinement was not "incidental to" the murders.

[**People v. Turner**, 128 Ill.2d 540, 531 N.E.2d 1196 \(1989\)](#) Defendant was properly convicted of both criminal sexual assault and aggravated criminal sexual assault. The evidence showed numerous sexual assaults against the victim. Defendant committed one sexual assault himself, and the jury could have found him accountable for another committed by the codefendant. See also, [**People v. Hines**, 165 Ill.App.3d 289, 518 N.E.2d 1362 \(4th Dist. 1988\)](#).

[**People v. Segara**, 126 Ill.2d 70, 533 N.E.2d 802 \(1988\)](#) Defendant was properly convicted of two counts of aggravated criminal sexual assault where the evidence showed both vaginal rape and oral sex.

[**People v. Cunningham**, 365 Ill.App.3d 991, 851 N.E.2d 653 \(5th Dist. 2006\)](#) Where more than one offense arises from a series of closely related acts and the offenses are not, by definition, lesser included offenses, multiple convictions with concurrent sentences may be entered. Whether offenses are lesser included crimes is determined by the "charging instrument" approach, under which the allegations of the charge are examined

to determine if the "main outline" of the lesser offense is set forth.

Under the circumstances of this case, armed violence predicated on residential burglary was not a lesser included offense of home invasion. Residential burglary as it was charged contained an element - intent to commit theft - that is not an element of home invasion. Because armed violence was not a lesser included offense of home invasion, convictions could be entered on both offenses and concurrent sentences imposed.

[People v. Anderson, 325 Ill.App.3d 624, 759 N.E.2d 83 \(4th Dist. 2001\)](#) The court affirmed convictions for counts of aggravated criminal sexual assault involving: (1) contact between defendant's penis and the victim's vagina, and (2) contact between defendant's fingers and the victim's vagina. The court rejected defendant's argument that because his hand came in contact with the complainant's vagina only when he was attempting to insert his penis, judgment could be entered on only one count. The State presented sufficient evidence for a rational jury to find the essential elements of separate crimes beyond a reasonable doubt.

[People v. White, 311 Ill.App.3d 374, 724 N.E.2d 572 \(4th Dist. 2000\)](#) Convictions for unlawful possession of a weapon by a felon and armed violence based on illegal possession of a controlled substance do not violate the "one act, one crime" doctrine. Possession of two items of contraband constitutes simultaneous, separate "acts."

Here, armed violence and UUV by a felon shared the common act of possession of a weapon. However, each offense also required an additional, separate element - possession of drugs for armed violence and status as a felon for UUV by a felon. Thus, the two offenses were not based on a single physical "act."

Also, because each charge failed to allege an essential element of the other crime, neither crime was a lesser included offense of the other.

[People v. Kleba, 110 Ill.App.3d 345, 442 N.E.2d 605 \(1st Dist. 1982\)](#) Defendant was properly convicted and sentenced for attempt rape, robbery and aggravated kidnapping. Each offense was based upon a separate physical act. See also, [People v. Olbrot, 106 Ill.App.3d 367, 435 N.E.2d 1242 \(1st Dist. 1982\)](#) (attempt murder and aggravated battery); [People v. Bocclair, 106 Ill.App.3d 515, 435 N.E.2d 1237 \(1st Dist. 1982\)](#) (armed robbery and unlawful restraint); [People v. Wojtasi, 104 Ill.App.3d 263, 432 N.E.2d 925 \(1st Dist. 1982\)](#) (deviate sexual assault and indecent liberties with a child); [People v. Palmer, 76 Ill.App.3d 1014, 395 N.E.2d 713 \(5th Dist. 1979\)](#) (aggravated battery and murder); [People v. Govednik, 150 Ill.App.3d 717, 502 N.E.2d 276 \(1st Dist. 1986\)](#) (home invasion and residential burglary).

[People v. Schultz, 73 Ill.App.3d 379, 392 N.E.2d 322 \(3d Dist. 1979\)](#) Convictions for three counts of aggravated kidnapping upheld where three different victims were involved. Convictions for two counts of aggravated kidnapping against the same victim also upheld, since the acts were not simultaneous and took place at different locations and different times.

[People v. Watson, 35 Ill.App.3d 723, 342 N.E.2d 398 \(2d Dist. 1976\)](#) It was proper to convict defendant of both burglary and possession of burglary tools. "Burglary and possession of burglary tools are separate acts not arising from the same conduct unless the possession is shown to be exclusively for the purpose of committing that burglary for which one is convicted."

[People v. Pettus, 84 Ill.App.3d 390, 405 N.E.2d 489 \(4th Dist. 1980\)](#) It was proper for the trial court to enter judgment and sentences for attempt rape and burglary with intent to commit rape. Although the offenses were closely related, they were based upon separate acts with different mental states.

Defendant, a convicted felon, was properly convicted of two separate firearm offenses based on his simultaneous possession of a firearm and the firearm ammunition that was loaded in the gun. The court held that the UUW by a felon statute specifically authorizes two separate convictions for simultaneously possessing a firearm and firearm ammunition, and the two convictions did not violate the one act/one crime rule.

1. The UUW by a felon statute makes it unlawful for a person who has been convicted of a felony to possess any firearm or firearm ammunition. [720 ILCS 5/24-1.1\(a\)](#). The statute specifically states that “the possession of each firearm or firearm ammunition in violation of this Section constitutes a single and separate violation.” [720 ILCS 5/24-1.1\(e\)](#). The court held that based on this language, the statute unambiguously authorizes separate convictions when a felon possesses a loaded firearm: a conviction for possessing the firearm, and a conviction for possessing the ammunition inside the firearm.

2. The court also held that multiple convictions did not violate the one act/one crime rule. Under that rule, a defendant may not be convicted of multiple offenses based on the same physical act. But multiple convictions are permitted in cases where a defendant commits several acts, even if they are interrelated. An act is defined as any overt or outward manifestation that will support a conviction.

Here defendant possessed two separate and distinct items of contraband, a firearm and ammunition. Although his possession was simultaneous, that fact alone did not render his conduct a single act. Instead, defendant committed two separate acts: possession of a firearm and possession of ammunition. Each act was materially different, even if both items were possessed simultaneously.

Defendant’s multiple convictions were affirmed.

(Defendant was represented by Assistant Defender Ginger Odom, Chicago.)

People v. Miller, 238 Ill.2d 161, 938 N.E.2d 498 (2010)

1. Under [People v. King, 66 Ill.2d 551, 363 N.E.2d 838 \(1977\)](#), multiple convictions and sentences can be entered where the defendant is convicted of multiple offenses arising from a series of incidental or closely related acts, and none of the offenses are by definition lesser included offenses of any of the other offenses. The **King** doctrine requires a two-step analysis under which the court must first determine whether the defendant’s conduct involved a single or multiple acts. If only a single act was involved, only one conviction may be imposed.

If the conduct involved multiple acts, the court must then determine whether any of the offenses are lesser included offenses. If so, multiple convictions are improper.

2. Illinois courts have used three methods to determine whether one crime is a lesser included offense of another crime: (1) the “abstract elements” approach, under which the statutory elements of the offenses are compared; (2) the “charging instrument” approach, under which the charging instrument is examined to determine whether the description of the greater offense contains a “broad foundation” or “main outline” of the lesser offense; and (3) the “evidence” or “fact” approach, under which the court looks to the facts adduced at trial to determine whether proof of the greater offense necessarily establishes the lesser offense.

The court stated that where the issue is whether the jury should be instructed on an uncharged lesser included offense, the predominant concern is providing notice of the offenses of which a defendant may be convicted. Under these circumstances, the “charging instrument” approach is appropriate.

When determining whether multiple convictions may be entered for closely related acts, however, the defendant has notice of the possible convictions based on the charges. The “abstract elements” approach is more appropriate for these purposes, because it permits defendants to be held accountable for the full measure of their conduct and resulting harm.

Thus, application of the “one act, one crime” doctrine is determined under the “abstract elements” test.

3. Because it is possible to commit burglary without necessarily committing retail theft, retail theft is not a lesser included offense under the abstract elements test. First, each offense contains unique elements not included in the other. Second, the mental states for the offenses differ; burglary requires intent to commit

a felony or theft, while retail theft requires intent to deprive a merchant of possession, use or benefit of merchandise without paying the full retail value.

The court concluded that convictions for retail theft and burglary were proper under **King**. (Defendant was represented by Assistant Defender Deborah Pugh, Chicago.)

People v. Nunez, 236 Ill.2d 488, 925 N.E.2d 1083 (2010)

Defendant was convicted of one count of aggravated driving under the influence of a drug or combination of drugs while his driver's license was suspended or revoked and one count of driving while his license was suspended or revoked. Defendant was sentenced to concurrent terms of two years imprisonment.

1. The court rejected the argument that the conviction for driving while license revoked must be vacated on one-act, one-crime principles. Under Illinois law, multiple convictions may not be based on a single physical act. Where convictions are based on multiple acts, however, the defendant is prejudiced only if some of the convictions are, by definition, lesser included offenses of other convictions.

2. When conducting a one-act, one-crime analysis, the court must first determine whether the defendant's conduct consisted of one or several acts. If it is determined that the defendant committed multiple acts, the court must go on to determine whether any of the convictions are for lesser included offenses. If so, multiple convictions are improper.

3. Because the legislature has provided that the penalty for driving while license revoked for DUI "shall be in addition to the penalty imposed for any subsequent" DUI ([625 ILCS 5/11-501\(b\)\(1\), \(2\)](#)), it intended that sentences be imposed both for driving while license revoked and aggravated DUI. "Since we are aware of no constitutional principle contravened by the statute, the legislation's intent must be given effect."

4. The court rejected the argument that multiple convictions were improper because DWLR based on a previous DUI conviction is a lesser included offense of aggravated DUI. A lesser included offense is one that: (1) is composed of some but not all of the elements of the greater offense, and (2) has no element that is not included in the greater offense. The court concluded that having a revoked driver's license is not an element of aggravated DUI, but merely a factor which enhances sentencing. Because aggravated DUI does not contain all of the elements of DWLR, therefore, the latter is not a lesser included offense of the former.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

People v. Bouchee, 2011 IL App (2d) 090542 (No. 2-09-0542, 12/6/11)

1. Multiple convictions are prohibited where the offenses are carved from the same physical act or where, with regard to multiple acts, one of the offenses is a lesser-included offense of the other. To determine whether a charged offense is a lesser included of another charged offense for purposes of this rule, courts employ the abstract-elements approach. Under this approach, if all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second. **People v. Miller, 238 Ill.2d 161, 938 N.E.2d 498 (2010)**. To satisfy the abstract-elements approach, it must be impossible to commit the greater offense without necessarily committing the lesser offense. Whether one charge is a lesser-included offense of the other is a legal question reviewed *de novo*.

2. Defendant was convicted of home invasion, in that he entered a dwelling and therein committed a criminal sexual assault, and criminal sexual assault. Under the abstract-elements approach, criminal sexual assault is not a lesser-included offense of home invasion because it is possible to commit home invasion without necessarily committing criminal sexual assault. A person can also commit home invasion under the charged subsection by entering and committing therein criminal sexual abuse. [720 ILCS 5/12-11\(a\)\(6\)](#).

The court rejected the argument that home invasion is analogous to felony murder, where the predicate felony is deemed to be a lesser-included offense of felony murder for purposes of the same-elements test employed for double-jeopardy purposes. Although the same-elements test is equivalent to the

abstract-elements approach, unlike felony murder, it would contravene legislative intent to treat home invasion and its predicate felony as a single offense.

In the case of felony murder, the predicate felony supplies the mental state for first-degree murder. Therefore it can be safely assumed that the legislature did not intend to allow convictions for both the murder and the predicate felony. In contrast, the gravamen of home invasion is unauthorized entry, and that gravamen is complete when a person knowingly enters without authority, knowing that one or more persons is present. [720 ILCS 5/12-11\(a\)](#). Although home invasion also requires the subsequent commission of another offense, that offense is a discrete offense with its own elements and mental state.

Moreover, the predicate offense is not necessarily “lesser.” For instance, in the case of criminal sexual assault, the predicate offense could be subject to a extended-term penalty greater than that available for home invasion. Because it must be presumed that the legislature did not intend to create an absurdity or an injustice, it cannot be presumed that the legislature intended that a person could commit the gravamen of home invasion, and receive punishment for the same, but receive no punishment for even a more serious offense that he commits inside.

Because criminal sexual assault is not a lesser-included offense of home invasion, both convictions stand.

(Defendant was represented by Assistant Defender Darren Miller, Elgin.)

[People v. Fuller, 2013 IL App \(3d\) 110391 \(No. 3-11-0391, 5/30/13\)](#)

1. When multiple charges arise from the same act, the defendant may be convicted and sentenced for the most serious offense. Where multiple charges arise from multiple acts, the court must determine whether any other offenses are lesser included offenses. If so, multiple convictions are improper.

Defendant was convicted of home invasion and criminal sexual assault, and argued that criminal sexual assault was a lesser included offense of home invasion and therefore could not be the subject of a separate conviction.

Illinois courts have identified three methods for determining whether one crime is a lesser included offense of another offense: (1) the “charging instrument” approach, (2) the “abstract elements” approach, and (3) the “facts or evidence adduced at trial” approach. In [People v. Miller, 238 Ill.2d 161, 938 N.E.2d 498 \(2010\)](#), the Supreme Court held that the “abstract elements” approach governs whether a charged offense is a lesser included crime of another charged offense.

Under the abstract elements approach, if all of the elements of one offense are included in the second offense, and the first offense contains no element that is not also an element of the second offense, the first offense is a lesser included offense of the second crime. In other words, a crime is a lesser included offense if it is impossible to commit the greater offense without committing the lesser offense.

Home invasion is committed where one: (1) knowingly enters the dwelling place of another with reason to know that persons are present, and (2) intentionally causes injury, uses force or threatens to use force while armed with a dangerous weapon, personally discharges a firearm that causes great bodily harm or death, uses force or threatens to use force while discharging a firearm, or commits any of several specified sex offenses against a person in the dwelling. The court concluded that because it is possible to commit home invasion without necessarily committing criminal sexual assault, criminal sexual assault is not a lesser included offense of home invasion where both offenses are charged. The court added that even if only the sex offense provision of the home invasion statute is considered, home invasion may occur by the commission of sex offenses other than criminal sexual assault. Therefore, where both offenses are charged and the abstract elements test applies, criminal sexual assault is not a lesser included offense of home invasion.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

[People v. Jimerson, 404 Ill.App.3d 621, 936 N.E.2d 749 \(1st Dist. 2010\)](#)

A defendant may not be convicted of multiple offenses based on the same physical act. An “act” is

any overt outward manifestation supporting a different offense, even though closely related. If the charging instrument does not differentiate between the closely-related acts, multiple convictions cannot stand. It is unfair to allow the State on appeal to apportion the crimes among the various acts where it had not sought to do so at trial.

Where the evidence at trial proved that defendant and his accomplices struck correctional officers multiple times, convictions for both mob action and aggravated battery could stand. The State proceeded at trial on the theory that the multiple strikes were separate acts.

(Defendant was represented by Assistant Defender Jessica Hunter, Chicago.)

People v. Pittman, 2014 IL App (1st) 123499 (No. 1-12-3499, 12/23/14)

The simultaneous possession of different types of controlled substances will not support more than one conviction and sentence unless the statute expressly authorizes multiple convictions. **People v. Manning, 71 Ill.2d 132, 374 N.E.2d 200 (1978)**. Where defendant threw 1.8 grams of heroin into a garbage can as he was fleeing police, and after his arrest led police to an additional 3.1 grams of heroin concealed in the wheel well of a boat located in an adjacent vacant lot, the court found that defendant engaged in separate rather than simultaneous acts of possession.

An “act” is any overt or outward manifestation which will support a different offense. Here, there was evidence to support a finding of an act of actual possession of the heroin which defendant discarded while fleeing the police. In addition, there was separate evidence of an independent act of constructive possession of the heroin found in the boat. Under these circumstances, two acts of possession occurred.

Even where more than one act occurred, multiple convictions are permitted only if the State apportioned each act to separate charges in the indictment or information. That requirement was satisfied here, because the State charged separate offenses based on the separate acts.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

People v. Price, 2011 IL App (4th) 100311 (No. 4-10-0311, 9/16/11)

1. Under **People v. King, 66 Ill.2d 551, 363 N.E.2d 838 (1977)**, a defendant may not be convicted of multiple offenses based on precisely the same act. An “act” is “any overt or outward manifestation which will support a different offense.” So long as offenses consist of multiple acts under **King**, a defendant may be convicted of two offenses which share a common act, unless one of the offenses is a lesser included offense of the other. **People v. Rodriguez, 169 Ill.2d 183, 661 N.E.2d 305 (1996)**.

2. The court found that convictions of residential burglary and home invasion share a common act – an act of entry – but that home invasion requires the additional act of causing injury to a resident. The **Rodriguez** rule applies, therefore, and both convictions may stand. Because the defendant did not argue that residential burglary was included in home invasion, the court found that it need not determine whether residential burglary is a lesser included offense of home invasion.

3. The court acknowledged that in **People v. McLaurin, 184 Ill.2d 58, 703 N.E.2d 11 (1988)**, the Supreme Court vacated a residential burglary conviction after finding that home invasion and residential burglary were based on the same physical act of entering the dwelling of the victim. The court also acknowledged that several Appellate Courts have vacated residential burglary convictions based on **McLaurin**. The court noted, however, that **McLaurin** did not discuss the applicability of **Rodriguez** or “the fact the home-invasion offense required the additional physical act of causing injury to a person in the dwelling.” The court also noted that **McLaurin** also held that convictions could be entered for both intentional murder and home invasion which shared a common act - setting a fire - because home invasion required the additional act of entry to the victim’s residence. The court concluded that applying both **Rodriguez** and **McLaurin**, defendant’s convictions of home invasion and residential burglary should both be affirmed.

(Defendant was represented by Assistant Defender Michael Vonnahmen, Springfield.)

[People v. Schmidt, 405 Ill.App.3d 474, 938 N.E.2d 559 \(3d Dist. 2010\)](#)

Multiple convictions and sentences can be entered where the defendant is convicted of multiple offenses arising from a series of incidental or closely related acts, and none of the offenses are by definition lesser included offenses of any of the other charges. Determining whether multiple convictions are permissible requires a two-step analysis under which the court must first determine whether the defendant's conduct involved a single or multiple acts. If a single act was involved, only one conviction may be imposed.

If the conduct involved multiple acts, the court must also determine whether any of the offenses are lesser included offenses. If so, multiple convictions are improper. The "abstract elements" test is used to determine whether a crime is a lesser included offense.

Here, defendant was convicted of unlawful use of property to commit a methamphetamine violation, possession of methamphetamine, and possession of a methamphetamine precursor. The convictions were based on three acts: possession of methamphetamine, possession of pseudoephedrine, and using a vehicle to possess methamphetamine. Thus, multiple convictions were permissible unless any of the charges were lesser included offenses.

As a matter of plain error, the court concluded that possession of methamphetamine was an included offense of unlawful use of property. Defendant was charged with unlawful use of property for knowingly using his personal vehicle to possess methamphetamine. Because all of the elements of possession of methamphetamine are required to commit the offense of unlawful use of property to possess methamphetamine, the possession offense was vacated.

However, the court rejected the State's confession of error that possession of a methamphetamine precursor was also a lesser included offense of unlawful use of property. The jury instructions showed that the unlawful use of property charge was based on the defendant's use of his vehicle to possess methamphetamine, not on the possession of pseudoephedrine. Thus, under the State's theory of the case, the elements of possession of a methamphetamine precursor were not included in the unlawful use of property charge.

The conviction for possession of methamphetamine was vacated. The cause was remanded for resentencing.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

[People v. Sotelo, 2012 IL App \(2d\) 101046 \(No. 2-10-1046, 3/29/12\)](#)

[430 ILCS 65/2\(a\)](#) defines the offenses of unlawful possession of a firearm and unlawful possession of ammunition:

(a)(1) No person may acquire or possess any firearm, stun gun, or taser . .
. without having in his possession a [FOID] card. . . .

(2) No person may acquire or possess firearm ammunition within this State
without having in his or her possession a [FOID] card.

1. Under [People v. King, 66 Ill. 2d 551, 363 N.E.2d 838 \(1977\)](#), multiple convictions are prohibited for offenses carved from a single physical act or, with regard to multiple acts, where one of the offenses is a lesser included offense of the other. However, **King** does not prohibit multiple convictions for the simultaneous possession of multiple firearms without an FOID card. Although the "singular act of failing to possess a FOID card could not sustain multiple convictions of an offense comprised *solely of that act*, failing to possess a FOID card may serve as a common element of multiple offenses that include additional physical acts - possession of different firearms, or of firearm ammunition."

2. However, the court concluded that the General Assembly did not intend to authorize multiple convictions for the simultaneous possession of multiple weapons without an FOID card. In determining whether the legislature intended to permit multiple convictions, the court is required to determine the "allowable unit of prosecution" for [§65/2\(a\)](#). Where a statute is ambiguous as to the allowable unit of prosecution, the court "must adopt a construction which favors the defendant."

In [People v. Carter](#), 213 Ill. 2d 295, 821 N.E.2d 233 (2004), the Illinois Supreme Court concluded that a statute which prohibited the possession of “any firearm or any firearm ammunition” was ambiguous because it could be read as providing either that the possession of each firearm constituted a separate offense, or as providing that the simultaneous possession of multiple firearms and ammunition constitute only a single offense. Because the statute was ambiguous, the **Carter** court adopted an interpretation that favored the defendant and held that the simultaneous possession of multiple firearms and ammunition constituted only a single offense.

The court reached the same conclusion concerning [§65/2\(a\)\(1\)](#), which uses similar language to the statute in [Carter](#). Thus, because the legislature did not intend that the simultaneous possession of multiple firearms constitutes multiple violations of [§65/2\(a\)\(1\)](#), two of three of defendant’s convictions under (a)(1) must be vacated.

The court reached the opposite conclusion concerning the possession of ammunition, however. The court concluded that had the General Assembly intended the simultaneous possession of firearms and ammunition to constitute a single unit of prosecution, it would have placed the firearms and ammunition provisions in a single statute rather than in two separate subsections. The court concluded that the structure of §65(a) showed that the General Assembly intended to permit separate convictions for possession of firearms without a FOID card and possession of ammunition without a FOID card. Thus, defendant’s conviction for possession of ammunition was affirmed.

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

People v. Stanford, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-09-0420, 6/16/11)

Prejudice results to defendant where more than one offense is carved from the same physical act. With respect to multiple acts, defendant suffers prejudice when he is convicted of more than one offense, some of which are by definition lesser-included offenses. Multiple convictions based on several acts cannot stand when the charging instrument treats the defendant’s multiple acts as a separate act.

When the issue is whether one offense is a lesser-included offense of the other under the one-act, one-crime rule, the abstract elements approach is followed. Under this approach, a comparison is made of the statutory elements of two offenses. If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second. In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense.

Defendant was convicted of attempt murder and armed violence based on aggravated battery. Defendant admitted that separate injuries to the complainant’s head and both ankles resulted from three separate acts. The court rejected the argument that the charging instrument treated the defendant’s separate acts as a single act where the three armed violence counts differentiated between the injuries that the complainant suffered, even though the attempt murder charge did not. The prosecutor’s argument that defendant’s intent to kill was established by his firing multiple shots did not reflect a theory of the case that the shots constituted a single act. Therefore, defendant’s convictions for attempt murder and armed violence were not based on one physical act.

Applying the abstract elements approach, defendant’s armed violence conviction was not a lesser included of the attempt murder conviction. All of the elements of armed violence based on aggravated battery alleging great bodily harm are not included in the offense of attempt murder. Armed violence requires that defendant personally discharge a firearm that is a category I or II weapon, whereas attempt murder does not. Armed violence predicated on aggravated battery requires infliction of great bodily harm, while attempt murder does not. Because it is possible to commit attempt murder without committing armed violence, armed violence is not a lesser included of attempt murder.

(Defendant was represented by Assistant Defender Kathleen Weck, Elgin.)

[People v. Stull](#), 2014 IL App (4th) 120704 (4-12-0704, 2/21/14)

1. Under [People v. King, 66 Ill. 2d 551, 363 N.E.2d 838 \(1977\)](#), a criminal defendant may not be convicted of multiple counts arising from a series of incidental or closely related acts, or where any of the offenses are by definition lesser included offenses of any of the other offenses. Three tests have been used to determine whether one crime is a lesser included offense of another: (1) the “abstract elements” approach, under which the statutory elements of the offenses are compared; (2) the “charging instrument” approach, under which the charging instrument is examined to determine whether the description of the greater offense contains a “broad foundation” or “main outline” of the lesser charge; and (3) the “evidence” or “fact” approach, under which the court looks to the facts adduced at trial to determine whether proof of the greater offense necessarily establishes the lesser offense.

2. When determining whether the jury should be instructed on an uncharged lesser included offense, the predominant concern is providing notice of the offenses of which a defendant may be convicted. Under these circumstances, the “charging instrument” approach is used.

However, when determining whether multiple convictions may be entered under **King**, the defendant has notice of the possible convictions based on the charges. In this situation, the “abstract elements” approach is more appropriate because it permits defendants to be held accountable for the full measure of their conduct and the harm caused. For purposes of **King**, therefore, application of the “one act, one crime” doctrine is determined under the “abstract elements” test. ([People v. Miller, 238 Ill. 2d 161, 938 N.E.2d 498 \(2010\)](#)).

3. Under the abstract elements approach, the statutory elements of the two offenses in question are compared. If all of the elements of one offense are included within the second offense, and the first offense contains no element not included in the second offense, the first offense is a lesser included of the second. The “statutory elements” approach is easily stated and applied, and results in a lesser included offense only where it is impossible to commit the greater offense without necessarily committing the lesser offense.

The court concluded that under the statutory elements test, aggravated criminal sexual abuse is not a lesser included offense of predatory criminal sexual assault of a child. Predatory criminal sexual assault of a child occurs where a person who is over the age of 17 commits an act of sexual penetration with a person who is under the age of 13. Aggravated criminal sexual abuse occurs where a “family member” commits an act of “sexual conduct” with a person who is under the age of 18. As relevant here, “sexual conduct” means the intentional or knowing touching or fondling of any part of the body of a child under the age of 13 for purposes of sexual gratification or arousal.

Because predatory criminal sexual assault of a child requires an act of sexual penetration, and aggravated criminal sexual abuse does not require penetration but does require a familial relationship, under the abstract elements test aggravated criminal sexual abuse is not a lesser included offense of predatory criminal sexual assault. Because defendant’s conviction for aggravated criminal sexual abuse did not violate the one-act one-crime rule, the conviction was affirmed.

(Defendant was represented by Assistant Defender, Colleen Morgan, Springfield.)

[People v. Yaworski, 2011 IL App \(2d\) 090785 \(No. 2-09-0785, mod. op. 10/14/11\)](#)

Multiple convictions may not be based on a single physical act. Where convictions are based on multiple acts, however, the defendant is prejudiced only if some of the convictions are, by definition, lesser-included offenses of other convictions.

Defendant was convicted of driving while his license was revoked (DWLR) and driving under the influence of alcohol (DUI). The DUI was a nonprobationable Class 2 felony because it was a fourth or subsequent DUI committed when the defendant’s driving privileges were revoked for a violation of the DUI statute. [625 ILCS 5/11-501\(c-1\)\(3\)](#).

Defendant’s DWLR conviction was not a lesser-included offense of his DUI conviction. The revocation of defendant’s driving privileges was a sentencing-enhancement factor, rather than an element of the DUI offense. [People v. Nunez, 236 Ill.2d 488, 925 N.E.2d 1083 \(2010\)](#).

Because the circuit court erroneously merged the convictions, the court reinstated the DWLR

conviction and imposed a concurrent sentence.

(Defendant was represented by Assistant Deputy Defender Paul Glaser, Elgin.)

[Top](#)

§55-3(c)

Multiple Convictions Improper

[People v. Payne, 98 Ill.2d 45, 456 N.E.2d 44 \(1983\)](#) A defendant may not be convicted of both armed violence and the underlying felony on which the armed violence was based.

[People v. Garcia, 179 Ill.2d 55, 688 N.E.2d 57 \(1997\)](#) Where multiple convictions of greater and lesser offenses are entered for offenses that arise from a single physical act, a sentence should be imposed on the most serious offense and the convictions on lesser offenses vacated. Where multiple convictions for the same offense arise from a single act, however, "there is no way to determine the most serious conviction because none of the convictions involve either a more or less culpable mental state." In such cases, the cause should be remanded for the trial court to determine the counts on which judgement will be entered.

[People v. Price, 221 Ill.2d 182, 850 N.E.2d 199 \(2006\)](#) Verdicts convicting defendants of theft by: (1) exerting unauthorized control over property with intent to permanently deprive, and (2) obtaining control over property under circumstances which would lead one to believe that the property was stolen, were not legally inconsistent. Regardless, it was error to enter convictions and sentences on both verdicts. Generally, when two or more related offenses arise from the same conduct, only the conviction for the most serious offense may stand. Because the convictions here were for the same offense and neither was more serious than the other, the court vacated the conviction for one count of theft and allowed the other to stand.

[People v. Carter, 213 Ill.2d 295, 821 N.E.2d 233 \(2004\)](#) In the absence of an express statutory provision to the contrary, statutes outlawing the possession of contraband do not authorize multiple convictions for the simultaneous possession of several items of contraband. [720 ILCS 5/24-1.1\(a\)](#), which prohibits the possession of "any firearm or any firearm ammunition" by a person who has been convicted by a felony, does not authorize multiple convictions for the simultaneous possession of multiple types of firearms and ammunition.

[People v. Pitsonbarger, 142 Ill.2d 353, 568 N.E.2d 783 \(1990\)](#) It was improper to convict defendant of six counts of murder where only two persons were killed. One conviction for intentional murder as to each victim was affirmed, and convictions for four counts of felony murder were vacated.

[People v. Conerty, 296 Ill.App.3d 459, 695 N.E.2d 898 \(4th Dist. 1998\)](#) Under [720 ILCS 5/2-9\(a\)](#), an included offense is one "established by proof of the same or less than all of the facts or a less culpable mental state (or both) than that which is required to establish the commission of the offense charged." In Illinois, a particular offense is "included" if the charging instrument describes it when alleging the greater charge.

Here, Count I charged defendant with committing home invasion "by entering the dwelling of the victim, knowing her to be present, and intentionally causing injury" by using force to commit an act of sexual penetration. Count II charged aggravated criminal sexual assault "in that during commission of home invasion, he knowingly committed" the same act of sexual penetration. Because home invasion was the sole aggravating factor comprising the offense of aggravated criminal sexual assault, and the intentional infliction of injury for home invasion was the act that constituted aggravated criminal sexual assault, home invasion was a lesser included offense.

[People v. Strong, 316 Ill.App.3d 807, 737 N.E.2d 687 \(3d Dist. 2000\)](#) "One act, one crime" principles precluded convictions for both armed violence based on possession of a controlled substance and possession of a controlled substance with intent to deliver, at least where all of the contraband was seized from a single area and there was no evidence to suggest that defendant segregated any of the substances for his personal use.

[People v. Boyd, 307 Ill.App.3d 991, 719 N.E.2d 306 \(3d Dist. 1999\)](#) Whether multiple convictions may properly stand is a question of law and subject to de novo review.

The indictment for aggravated battery with a firearm clearly set out the "main outline" of aggravated discharge of a firearm, because both indictments alleged that while acting with the required mental state defendant knowingly discharged a firearm in the direction of the complainant. In addition, the aggravated battery indictment alleged one element not involved in aggravated discharge of a firearm - that defendant's actions inflicted injury.

Because aggravated discharge of a firearm was a lesser included offense of aggravated discharge of a firearm, convictions could not be entered for both offenses. In addition, although defendant did not raise the issue in a post-trial motion, the erroneous entry of an improper conviction constitutes plain error.

[People v. Bussan, 306 Ill.App.3d 836, 715 N.E.2d 820 \(2d Dist. 1999\)](#) Under the circumstances of this case, theft was a lesser included offense of burglary. The burglary charge alleged an entry to a video business with intent to commit a theft, while the theft charge alleged the knowing exertion of unauthorized control over several video games with intent to permanently deprive the video store of the use of its property.

[People v. Damico, 309 Ill.App.3d 203, 722 N.E.2d 194 \(2d Dist. 1999\)](#) Convictions for aggravated battery and home invasion were not based on a single act; although the offenses shared a common element - injuring the victim by striking him with a blunt instrument - the home invasion was based on defendant's unlawful entry into the victim's house.

However, the aggravated battery conviction must be vacated as a lesser included offense of home invasion. Because the home invasion charge alleged that defendant entered the victim's dwelling and "intentionally caused injury" by striking the victim in the head with a blunt instrument, and the aggravated battery charge alleged that defendant intentionally caused great bodily harm by striking the victim in the head with a blunt object and fracturing his skull, the "main outline" of aggravated battery was alleged by the home invasion charge.

[People v. Brener, 357 Ill.App.3d 868, 830 N.E.2d 692 \(2d Dist. 2005\)](#) The double jeopardy clauses of the Federal and Illinois Constitutions protect against multiple punishments for the same offense. Double jeopardy precludes a subsequent prosecution for an offense arising from the same physical act as a lesser included offense for which defendant was previously prosecuted.

A one-hour, nonstop, alcohol-impaired drive through three counties constituted a single act, without regard to the time and distance which defendant drove. "Counties are not sovereign entities[,] but rather are subordinate government instrumentalities" that are equally subordinate to the State double-jeopardy prohibition. "[A]s equal, subordinate instrumentalities of Illinois, the counties must coordinate their efforts to prosecute an offender where that prosecution arises from the same act."

Because DUI is a lesser included offense of aggravated DUI, defendant's guilty plea to DUI in Winnebago County precluded a subsequent prosecution in Jo Daviess County for aggravated DUI based on the same act of driving while intoxicated.

[People v. James, 362 Ill.App.3d 250, 839 N.E.2d 1135 \(4th Dist. 2005\)](#) Where defendant stabbed the victim several times, but the State charged only that he "repeatedly stabb[ed] [the complainant] with a knife," the State failed to allege separate acts as multiple offenses. Thus, convictions for both aggravated domestic battery and attempt first degree murder violated the one-act, one-crime rule. Conviction for aggravated

domestic battery vacated.

[**People v. Johnson**, 347 Ill.App.3d 570, 807 N.E.2d 1171 \(1st Dist. 2004\)](#) Defendant's conviction for residential burglary was required to be vacated because it was based on the same entry as a conviction for home invasion. Although some counts of home invasion and residential burglary were based upon entry to the victim's dwelling place, while other counts were based upon entry to the dwelling place of the victim's mother, it was clear that the victim's and the victim's mother's dwelling place were "one [and] the same," and "that the defendant made but one unauthorized entry."

[**People v. Morgan**, 385 Ill.App.3d 771, 896 N.E.2d 417 \(3d Dist. 2008\)](#) Under "one-act one-crime" principles, only one count of home invasion may be based on a single entry to a residence, regardless of the number of persons present or harmed by defendant. Defendant did not waive the erroneous entry of judgment on three unauthorized counts of home invasion, either by pleading guilty or by failing to raise the issue in the motion to withdraw the plea.

[**People v. Young**, 362 Ill.App.3d 843, 840 N.E.2d 825 \(2d Dist. 2005\)](#) Where the State charged and prosecuted two counts of domestic battery under alternate theories of culpability, there could be only one conviction.

[**People v. Lillard**, 200 Ill.App.3d 173, 558 N.E.2d 616 \(4th Dist. 1990\)](#) It was error to convict defendant of both first degree murder and armed violence arising out of the firing of a single shot. Armed violence vacated.

[**People v. Agee**, 205 Ill.App.3d 146, 562 N.E.2d 545 \(1st Dist. 1990\)](#) Improper to convict for aggravated battery and attempt murder since aggravated battery is a lesser included offense.

[**People v. Crews**, 191 Ill.App.3d 228, 547 N.E.2d 580 \(4th Dist. 1989\)](#) It was error to convict defendant of both first degree murder and solicitation to commit murder. Chapter 38, ¶8-5 prohibits convictions for both a inchoate and principal offense. Compare, [**People v. Columbo**, 118 Ill.App.3d 882, 455 N.E.2d 733 \(1st Dist. 1983\)](#) (solicitation and murder convictions may stand where based on "distinctly separate, albeit interrelated acts").

[**People v. Jolliff**, 183 Ill.App.3d 962, 539 N.E.2d 913 \(4th Dist. 1989\)](#) It was improper to convict defendant of both aggravated kidnapping and aggravated battery. The latter offense was a lesser included offense of the former where the same aggravating factor (great bodily harm) was alleged for both.

[**People v. Bridges**, 188 Ill.App.3d 961, 545 N.E.2d 367 \(5th Dist. 1989\)](#) It was error to convict defendant of two counts of aggravated battery — one for causing bodily harm and the other for striking a police officer. Both offenses stemmed from the striking of the officer, all the blows were struck in rapid succession, and there was no intervening event. See also, [**People v. Varela**, 194 Ill.App.3d 357, 551 N.E.2d 318 \(3d Dist. 1990\)](#).

[**People v. Ellis**, 143 Ill.App.3d 892, 493 N.E.2d 739 \(3d Dist. 1986\)](#) Defendant was convicted of two counts of aggravated battery arising out of the beating of a single victim in a single occurrence. One count alleged that defendant caused great bodily harm to the victim, and the other count alleged that the beating occurred in a public place of accommodation. While multiple blows were struck, they came in rapid succession, without an intervening act or event. Defendant's conduct could not be broken into separate acts. Because both convictions were based upon a single act, one must be vacated.

[**People v. Morrison**, 137 Ill.App.3d 171, 484 N.E.2d 329 \(1st Dist. 1985\)](#) The three defendants were

convicted of seven counts of home invasion based upon their entry into an apartment where several persons were present.

It was error to convict defendants on seven counts of home invasion where there had been only one entry. Convictions for six of the seven counts were vacated.

[People v. Bratton, 178 Ill.App.3d 718, 533 N.E.2d 572 \(4th Dist. 1989\)](#) It was improper to convict defendant of both residential burglary and unlawful restraint. The unlawful restraint was the underlying felony on which the residential burglary was based, and every element of the unlawful restraint was also charged as an element of the residential burglary.

[People v. Govednik, 150 Ill.App.3d 717, 502 N.E.2d 276 \(1st Dist. 1986\)](#) It was improper to convict defendant of both home invasion and armed violence. [People v. Dawson, 116 Ill.App.3d 672, 452 N.E.2d 385 \(4th Dist. 1983\)](#) (residential burglary and burglary); [People v. Clerk, 68 Ill.App.3d 1021, 386 N.E.2d 630 \(1st Dist. 1979\)](#) (burglary with intent to commit rape and burglary with intent to commit theft); [People v. Jones, 75 Ill.App.3d 214, 393 N.E.2d 1132 \(5th Dist. 1979\)](#) (possession of cannabis and possession of cannabis with intent to deliver); [People v. Wagner, 76 Ill.App.3d 965, 395 N.E.2d 414 \(4th Dist. 1979\)](#) (sexual delinquency of child reversed, rape and deviate sexual assault); [People v. Clark, 71 Ill.App.3d 381, 389 N.E.2d 911 \(2d Dist. 1979\)](#) (official misconduct and bribery); [People v. Kosanovich, 69 Ill.App.3d 748, 387 N.E.2d 1061 \(1st Dist. 1979\)](#) (armed robbery and theft); [People v. Walker, 191 Ill.App.3d 382, 547 N.E.2d 1036 \(3d Dist. 1989\)](#) (theft and robbery).

[People v. Bitner, 89 Ill.App.3d 1106, 412 N.E.2d 721 \(3d Dist. 1980\)](#) Battery is a lesser included offense of home invasion; thus, it was error to convict of both offenses. See also, [People v. Monigan, 204 Ill.App.3d 686, 561 N.E.2d 1358 \(3d Dist. 1990\)](#) (home invasion and aggravated battery).

[People v. Pearson, 108 Ill.App.3d 241, 439 N.E.2d 31 \(4th Dist. 1982\)](#) It was improper for the trial court to enter judgment for criminal damage to property and reckless conduct, since both offenses were based on the single physical act of breaking a window in a tavern door. Conviction for criminal damage to property reversed.

[People v. Austin, 93 Ill.App.3d 495, 417 N.E.2d 671 \(1st Dist. 1981\)](#) Defendant was convicted of forgery and attempt theft arising out of one incident – the presentation of a forged check for payment. He received concurrent sentences. Attempt theft conviction vacated because both offenses stemmed from the same act.

[People v. Powell, 199 Ill.App.3d 291, 556 N.E.2d 896 \(4th Dist. 1990\)](#) It was improper to convict defendant of both theft and State benefits fraud based upon the same acts. Theft vacated.

Cumulative Digest Case Summaries §55-3(c)

[In re Rodney S., 402 Ill.App.3d 272, 932 N.E.2d 588 \(4th Dist. 2010\)](#)

Even if closely related, separate blows are separate acts that support multiple convictions, but only if the State treats them as separate acts at the trial level. If the State charges the multiple blows as a single physical act, multiple convictions are improper. [People v. Crespo, 203 Ill.2d 335, 788 N.E.2d 1117 \(2001\)](#).

In this case, the State could have but did not differentiate between the multiple blows struck by the respondent. Instead, it charged a series of acts in each count of two counts of aggravated battery. Therefore, the Appellate Court vacated one of the convictions.

(Defendant was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Bailey, 409 Ill.App.3d 574, 948 N.E.2d 690 (1st Dist. 2011)

Multiple convictions are improper if they are based on precisely the same physical act. If a defendant is convicted of two offenses based on the same physical act, the conviction for the less serious offense must be vacated.

When a defendant has committed multiple acts, each capable of sustaining a separate conviction, the State can charge defendant either for each separate act or for the cumulative effect of the acts under multiple theories of the offense. But in order to sustain multiple convictions, the State must provide notice to the defendant in the charging instrument that it intends to treat the conduct of the defendant as multiple acts.

The defendant was convicted of multiple counts of financial exploitation of an elderly person. Two counts charged that defendant “knowingly and by deception obtained control over property,” of the victim, which the court construed to refer to her obtaining of a durable power of attorney from the victim. The court ordered that the counts charging that act should merge into the count charging the greater amount of money, as that was the more serious offense, even though both carried the same penalty.

Two other counts charged that defendant “knowingly and illegally used the assets or resources” of the victim, which the court construed to refer to her unauthorized taking of the victim’s savings. Although the evidence showed that multiple takings took place over a period of months, the State did not charge each taking as a separate act. Therefore, the State was not entitled to multiple convictions. The counts charging the act of taking merged into the count charging the greater amount of money, as that was the more serious offense, even though both carried the same penalty.

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

People v. Clark, 2014 IL App (1st) 123494 (No. 1-12-3494, 11/20/14)

1. A defendant has a due process right to notice of the charges brought against him. A defendant may be convicted of an uncharged offense only if that crime is a lesser included offense of a crime with which the defendant is expressly charged. The charging instrument approach is used to determine whether an uncharged crime is a lesser-included offense.

Under this approach, the court looks first to the allegations of the charging instrument to see whether the description of the greater offense contains the broad foundation or main outline of the lesser offense. Every element of the lesser offense need not be explicitly contained in the greater charge, so long as the missing elements can be reasonably inferred. If the description of the greater offense contains the broad foundation of the lesser offense, the defendant may be convicted of the lesser offense if the evidence presented at trial rationally supports a conviction on that offense.

[720 ILCS 5/18-4\(a\)](#) provides alternative methods of committing aggravated vehicular hijacking: (1) by taking a motor vehicle from the person or immediate presence of another by the use or threat of immediate force while armed “with a dangerous weapon, other than a firearm,” ([720 ILCS 5/18-4\(a\)\(3\)](#)), or (2) by taking a motor vehicle from the person or immediate presence of another by the use or threat of immediate force while armed “with a firearm.” ([720 ILCS 5/18-4\(a\)\(4\)](#)). Similarly, armed robbery is defined as: (1) knowingly taking property other than a vehicle from the person or the presence of another by the use or threat of imminent force while armed with “a dangerous weapon, other than a firearm” ([720 ILCS 5/18-2\(a\)\(1\)](#)), or (2) knowingly taking property other than a vehicle from the person or the presence of another by the use or threat of imminent force while armed with “a firearm.” ([720 ILCS 5/18-2\(a\)\(1\)](#)). Thus, the statutes create mutually exclusive forms of armed robbery and aggravated vehicular hijacking depending on the nature of the weapon used.

Because the offenses are mutually exclusive, charging one offense does not allege the basic outlines of the alternative offenses. In other words, the allegation that defendant was armed with a firearm necessarily excluded an allegation that he was armed with a dangerous weapon other than a firearm. Furthermore, none of the language in the charging instrument implies that defendant was armed with a weapon other than a firearm or that he used a firearm as a bludgeon. Therefore, aggravated vehicular hijacking with a dangerous weapon other than a firearm and armed robbery with a dangerous weapon other than a firearm were not lesser

included offenses of aggravated vehicular hijacking with a firearm and armed robbery with a firearm.

2. The court concluded that entering judgment on offenses that were not lesser-included offenses of charged offenses constitutes plain error under the second prong of the plain error rule, which applies to clear and obvious errors which are so serious as to affect the reliability of the trial and challenge the integrity of the judicial process.

The convictions were reduced to vehicular hijacking and robbery and the cause was remanded for re-sentencing.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

People v. Cook, 2011 IL App (4th) 090875 (No. 4-09-0875, 9/9/11)

A defendant may not be convicted of multiple offenses based on a single act. Courts have interpreted this rule to prohibit convicting a defendant (1) of multiple counts of reckless homicide, premised on drunken driving, where a single victim was killed, or (2) under multiple subsections of the DUI statute for a single instance of driving, or (3) of multiple counts of an aggravated offense based on the same aggravating circumstance.

Defendant was convicted of three counts of aggravated DUI in that he caused a death by driving under the influence of alcohol, by driving with a BAC of .08 or greater, and by driving under the combined influence of alcohol and other drugs. Because he committed a single act of driving having consumed the alcohol and illegal drugs that impaired him, and a single death resulted from the ensuing accident, only one of the three convictions could stand.

(Defendant was represented by Assistant Defender Michael Delcomyn, Springfield.)

People v. Gillespie, 2014 IL App (4th) 121146 (No. 4-12-1146, 12/22/14)

1. Under **People v. King, 66 IL 2d 551, 363 N.E.2d 838 (1977)**, where more than one offense arises from a series of closely related acts and the offenses are not by definition lesser-included offenses, convictions with concurrent sentences can be entered on all of the offenses. Although the Illinois Supreme Court has identified three possible methods for determining whether one offense is a lesser-included offense of another, the appropriate test for **King** purposes is the abstract elements test. Under this test, a crime is a lesser-included offense if all of its elements are included within a second offense and it contains no element not included in the second offense.

For there to be a lesser included offense under the abstract elements test, it must be impossible to commit the greater offense without also committing the lesser offense. The abstract elements approach does not consider the facts of a crime as charged in the particular charging instrument or as proved at trial.

2. Defendant was convicted of robbery and aggravated criminal sexual assault based on committing a criminal sexual assault during the commission of a felony. The predicate felony for the aggravated criminal sexual assault was the same robbery for which defendant was convicted.

The court concluded that under Illinois law, the predicate offense for a crime is necessarily a lesser-included offense of that crime. Thus, where robbery is the predicate offense for aggravated criminal sexual assault, robbery is by definition a lesser-included offense. The robbery conviction was vacated.

(Defendant was represented by Supervisor Marty Ryan, Springfield.)

People v. Hagler, 402 Ill.App.3d 149, 937 N.E.2d 204 (2d Dist. 2010)

Multiple convictions are improper if based on the same physical act. If a common act is part of both offenses, or part of one offense and the only act of another, multiple convictions can stand. The key question is whether there is a separate act that will support a different offense.

Defendant was convicted of aggravated battery of a peace officer and resisting a peace officer, proximately causing injury to the officer. Both charges alleged an injury to the officer that occurred when defendant slammed a door on the officer, causing the officer's hand and arm to go through a glass pane on the door. The slamming of the door was the only act that formed the basis for the aggravated battery charge.

The Appellate Court rejected the State's argument that the defendant's act of running when instructed by the officer to stop was a separate act that supported the resisting conviction. Because the resisting statute ([720 ILCS 5/31-1\(a-7\)](#)) requires that the act of resisting be the proximate cause of the injury to the officer in order to impose a Class 4 sentence, there was only one act that formed the basis for both charges.

The court vacated defendant's conviction for resisting a peace officer proximately causing injury, which is a less serious offense (Class 4 felony) than aggravated battery to an officer (Class 2 felony).

(Defendant was represented by Assistant Defender John Hildebrand, Elgin.)

People v. Hardin, 2012 IL App (1st) 100682 (No. 1-10-0682, 8/22/12)

Under the one-act, one-crime doctrine, a defendant may not be convicted of multiple crimes if they are based on precisely the same physical act.

Subsection (a)(3) of the aggravated-discharge-of-a-firearm statute prohibits discharge of a firearm "in the direction of a person" defendant knows to be a police officer, while subsection (a)(4) prohibits the discharge of a firearm "in the direction of a vehicle" that defendant knows is occupied by a police officer. [720 ILCS 5/24-1.2\(a\)\(3\) and \(a\)\(4\)](#). Because the crime set forth in subsection (a)(4) is the discharge of a firearm in the direction of a vehicle rather than a person, evidence that defendant fired one gunshot at a vehicle occupied by two police officers could support but one conviction for aggravated discharge of a firearm under subsection (a)(4).

Salone, J., concurring and part and dissenting part, would uphold both convictions for aggravated discharge of a firearm even though they were derived from the same act because the legislature intended that the statute protect police officers, not vehicles.

(Defendant was represented by Assistant Defender Benjamin Wolowski, Chicago.)

People v. Koter, 2012 IL App (1st) 100951 (No. 1-10-0951, 9/28/12)

1. The "one act, one crime" doctrine prohibits multiple convictions based on a single physical act. If a defendant commits multiple acts, however, multiple convictions may stand provided that none of the offenses are lesser included offenses. An "act" is "any overt or outward manifestation which will support a different offense."

Whether a defendant was improperly convicted of multiple offenses arising from a single act, and whether charges are lesser included offenses, are questions of law that are reviewed *de novo*.

2. Where the defendant was convicted of five counts of theft for obtaining control over money belonging to the village which employed him as a parking enforcement officer and one count of official misconduct over a period of time which encompassed all five of the thefts, the court concluded that the single charge of official misconduct was based on the same physical act as the five thefts. Therefore, it was error to enter convictions on all of the offenses.

3. Where multiple convictions are improperly imposed, a sentence is to be imposed on the most serious offense and the convictions for the less serious offenses vacated. Because theft of government property as charged was a Class 2 felony and official misconduct was a Class 3 felony, the official misconduct conviction must be vacated. The convictions for five counts of theft were affirmed.

(Defendant was represented by Assistant Defender Kieran Wiberg, Chicago.)

People v. McFadden, 2014 IL App (1st) 102939 (No. 1-10-2939, 2/4/14)

As a matter of plain error, the court found that multiple convictions for unlawful use of a weapon by a felon were improper under the one-act, one-crime doctrine, which precludes multiple convictions based on precisely the same physical act or where one of the offenses is a lesser included offense of the other. For purposes of the doctrine, an "act" is any overt or outward manifestation which will support a different offense.

Defendant was convicted of three counts of armed robbery and two counts of unlawful use of a weapon by a felon arising from the commission of armed robberies against separate victims over a 24-hour-

period. The UUW by a felon convictions involved defendant's possession of a single weapon during two of the three robberies.

Noting that the UUW by a felon statute criminalizes possession rather than use of a weapon, the court concluded that a "singular and continuous" act of possession occurring over a several-hour period constitutes a single act for purposes of the one-act, one crime doctrine. Because the legislature is presumed to not have intended absurd results, the court concluded that the legislative intent of the UUW by a felon statute was to permit only one conviction for the continuous possession of a firearm, even where that firearm is used in the commission of several offenses during a single chain of events. Otherwise, "a potentially infinite number of convictions" could occur because "the defendant possessed the firearm from hour to hour, minute to minute, nanosecond to nanosecond."

The court vacated one of defendant's convictions for unlawful use of a weapon by a felon.
(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. McSwain, 2012 IL App (4th) 100619 (No. 4-10-0619, 1/18/12)

If a statute permits multiple convictions for simultaneous possession, the one-act, one-crime doctrine applies. When construing whether a statute permits multiple convictions, a court is required to ascertain and give effect to the intent of the legislature. the most reliable indicator of legislative intent is the plain language of the statute, which, if plain and unambiguous, must be read without exception, limitation, or other condition. Criminal statutes must be strictly construed in the defendant's favor.

The child pornography statute provides that a person commits child pornography who "with knowledge of the nature and content thereof, possesses *any* film, videotape, photograph or similar visual reproduction or depiction of any child . . . whom the person knows or reasonably should know to be under the age of 18 . . . engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection." [720 ILCS 5/11-20.1\(a\)\(6\)](#) (emphasis added).

The term "any" in the statute could be singular or plural, as it can mean "any one of a kind," "any kind," or "any number." The term "any" thus does not adequately define the allowable unit of prosecution for a child pornography offense. The statute is therefore ambiguous and must be construed in favor of the defendant. Consequently, the simultaneous possession of multiple images cannot support multiple convictions.

While agreeing with the State that each photograph exploits the minor and adds to the market, the court held that it is for the legislature to define what it desires to make an allowable unit of prosecution. By its amendment of other statutes, the legislature has demonstrated that it knows how to authorize multiple convictions for simultaneous violations of a single statute. The legislature can amend the statute if it wants to authorize multiple convictions based on simultaneous possession of different images of child pornography.

As defendant was convicted of five counts of child pornography based on his receipt of an email that displayed five photos within the body of that email, the court vacated convictions on four of those counts.
(Defendant was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Patrick, 406 Ill.App.3d 548, 956 N.E.2d 443 (2d Dist. 2010)

A defendant may not be convicted of or sentenced for more than one offense carved from a single physical act. "Act" means any overt or outward manifestation that would support a different offense.

The offense of leaving the scene of an accident involving death or injury contemplates that there may be several persons injured in an accident, but focuses on the duty of the driver to remain on the scene to provide information and assistance. [625 ILCS 5/11-401\(a\)](#). Therefore, defendant may not be convicted and sentenced for more than one offense of leaving the scene of an accident where there is only one accident scene, despite the number of persons injured or killed by the accident.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Ramirez, 2012 IL App (1st) 093504 (No. 1-09-3504, 8/15/12)

Under the one-act, one-crime doctrine, a court shall not impose multiple convictions where multiple offenses are carved from the same physical act. Even where there are arguably separate acts, separate convictions cannot be sustained where the prosecution does not charge the acts as separate offenses.

A person commits bribery when with the intent to influence the performance of any act related to the employment or function of a public employee, he promises or tenders to that employee property or personal advantage which the employee would not be authorized by law to accept. [720 ILCS 5/33-1\(b\)](#). The act of bribery is complete as of the promise where it is given with the requisite intent.

Defendant could be convicted of only one count of bribery based on evidence that he promised to pay a city employee a sum of money to delete four building code violations from the city's computer system, and tendered the employee money in payment on that promise on two separate dates. The act of bribery was complete when defendant promised to pay the sum of money. He could not be convicted of a separate act of bribery for his subsequent tender of a portion of that sum. The State could have charged defendant with multiple acts of bribery for the promises made with respect to the separate building code violations, but because it charged him with only one count of bribery for his actions on the date that he reached the agreement, it could obtain but one conviction.

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

[People v. Schmidt, 405 Ill.App.3d 474, 938 N.E.2d 559 \(3d Dist. 2010\)](#)

Multiple convictions and sentences can be entered where the defendant is convicted of multiple offenses arising from a series of incidental or closely related acts, and none of the offenses are by definition lesser included offenses of any of the other charges. Determining whether multiple convictions are permissible requires a two-step analysis under which the court must first determine whether the defendant's conduct involved a single or multiple acts. If a single act was involved, only one conviction may be imposed.

If the conduct involved multiple acts, the court must also determine whether any of the offenses are lesser included offenses. If so, multiple convictions are improper. The "abstract elements" test is used to determine whether a crime is a lesser included offense.

Here, defendant was convicted of unlawful use of property to commit a methamphetamine violation, possession of methamphetamine, and possession of a methamphetamine precursor. The convictions were based on three acts: possession of methamphetamine, possession of pseudoephedrine, and using a vehicle to possess methamphetamine. Thus, multiple convictions were permissible unless any of the charges were lesser included offenses.

As a matter of plain error, the court concluded that possession of methamphetamine was an included offense of unlawful use of property. Defendant was charged with unlawful use of property for knowingly using his personal vehicle to possess methamphetamine. Because all of the elements of possession of methamphetamine are required to commit the offense of unlawful use of property to possess methamphetamine, the possession offense was vacated.

However, the court rejected the State's confession of error that possession of a methamphetamine precursor was also a lesser included offense of unlawful use of property. The jury instructions showed that the unlawful use of property charge was based on the defendant's use of his vehicle to possess methamphetamine, not on the possession of pseudoephedrine. Thus, under the State's theory of the case, the elements of possession of a methamphetamine precursor were not included in the unlawful use of property charge.

The conviction for possession of methamphetamine was vacated. The cause was remanded for resentencing.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

[People v. Sedelsky, 2013 IL App \(2d\) 111042 \(No. 2-11-1042, 9/26/13\)](#)

Statutory construction requires a court to ascertain and give effect to the intent of the legislature. The most reliable indicator of legislative intent is the language of the statute, which, if plain and unambiguous,

must be read without exception, limitation, or condition. Criminal statutes must be strictly construed in defendant's favor.

The "allowable unit of prosecution" as defined by statute governs whether a particular course of conduct involves one or more distinct offenses under the statute.

Defendant was convicted and sentenced for two counts of possession of child pornography based on his possession of duplicate identical images uploaded at nearly the same time and stored in the same digital medium, but under different file names.

The child pornography statute proscribes possession of "any *** depiction by computer" of a pornographic image of a child. [720 ILCS 5/11-20.1\(a\)\(6\)](#). "Any" is not defined by statute and can mean singular or plural. Because "any" does not indicate whether the possession of duplicate depictions by computer in the same digital medium constitute separate offenses, the statute must be construed in defendant's favor. Therefore, only one conviction of possessing child pornography can be entered for defendant's possession of the same digital image stored in the same digital medium.

Because this holding applies only to the narrow facts presented, it does not conflict with the purpose of the child pornography statute, which is to "dry up" the pornography market. An individual possessing two duplicate digital images saved in the same medium cannot disseminate the image more widely than an individual possessing a single digital image. The images were not stored in different locations and could only be accessed through defendant's account.

(Defendant was represented by Assistant Defender Steven Wiltgen, Elgin.)

[People v. Sotelo, 2012 IL App \(2d\) 101046 \(No. 2-10-1046, 3/29/12\)](#)

[430 ILCS 65/2\(a\)](#) defines the offenses of unlawful possession of a firearm and unlawful possession of ammunition:

(a)(1) No person may acquire or possess any firearm, stun gun, or taser . .
. without having in his possession a [FOID] card. . . .

(2) No person may acquire or possess firearm ammunition within this State
without having in his or her possession a [FOID] card.

1. Under [People v. King, 66 Ill. 2d 551, 363 N.E.2d 838 \(1977\)](#), multiple convictions are prohibited for offenses carved from a single physical act or, with regard to multiple acts, where one of the offenses is a lesser included offense of the other. However, **King** does not prohibit multiple convictions for the simultaneous possession of multiple firearms without an FOID card. Although the "singular act of failing to possess a FOID card could not sustain multiple convictions of an offense comprised *solely of that act*, failing to possess a FOID card may serve as a common element of multiple offenses that include additional physical acts - possession of different firearms, or of firearm ammunition."

2. However, the court concluded that the General Assembly did not intend to authorize multiple convictions for the simultaneous possession of multiple weapons without an FOID card. In determining whether the legislature intended to permit multiple convictions, the court is required to determine the "allowable unit of prosecution" for [§65/2\(a\)](#). Where a statute is ambiguous as to the allowable unit of prosecution, the court "must adopt a construction which favors the defendant."

In [People v. Carter, 213 Ill. 2d 295, 821 N.E.2d 233 \(2004\)](#), the Illinois Supreme Court concluded that a statute which prohibited the possession of "any firearm or any firearm ammunition" was ambiguous because it could be read as providing either that the possession of each firearm constituted a separate offense, or as providing that the simultaneous possession of multiple firearms and ammunition constitute only a single offense. Because the statute was ambiguous, the **Carter** court adopted an interpretation that favored the defendant and held that the simultaneous possession of multiple firearms and ammunition constituted only a single offense.

The court reached the same conclusion concerning [§65/2\(a\)\(1\)](#), which uses similar language to the statute in [Carter](#). Thus, because the legislature did not intend that the simultaneous possession of multiple firearms constitutes multiple violations of [§65/2\(a\)\(1\)](#), two of three of defendant's convictions under (a)(1) must be vacated.

The court reached the opposite conclusion concerning the possession of ammunition, however. The court concluded that had the General Assembly intended the simultaneous possession of firearms and ammunition to constitute a single unit of prosecution, it would have placed the firearms and ammunition provisions in a single statute rather than in two separate subsections. The court concluded that the structure of §65(a) showed that the General Assembly intended to permit separate convictions for possession of firearms without a FOID card and possession of ammunition without a FOID card. Thus, defendant's conviction for possession of ammunition was affirmed.

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

[People v. Strawbridge, 404 Ill.App.3d 460, 935 N.E.2d 1104 \(2d Dist. 2010\)](#)

As a matter of plain error, the court found that the "one-act, one-crime" rule was violated where two counts of predatory criminal sexual assault of a child involved identical allegations except for the time periods involved, and the evidence would have allowed the jury to convict based upon a single instance occurring within the time periods alleged in both counts. Although there was adequate evidence in the record to support convictions on both counts, the court refused to assume that the jury based the verdicts on separate incidents.

The court vacated one of the convictions for predatory criminal sexual assault of a child.

(Defendant was represented by Assistant Defender Kathleen Weck, Elgin.)

[Top](#)

§55-4

Impeachment of Verdicts

[People v. Nuccio, 54 Ill.2d 39, 294 N.E.2d 276 \(1973\)](#) Defendant alleged in his motion for a new trial that jurors had considered his prior conviction for the same crime. A defense investigator testified that certain jurors told him that they had learned of the prior conviction, but no juror stated that the prior conviction was discussed during deliberations. The trial judge properly refused to call the jurors to testify at the post-trial hearing. The general rule is that jurors may not impeach their verdict.

[People v. Bocclair, 129 Ill.2d 458, 544 N.E.2d 715 \(1989\)](#) Following a jury trial, defendant was found guilty of murder. About 10 days later, one of the jurors wrote a letter to the parties in which he stated that he thought defendant was innocent. The juror claimed that he had resisted the guilty verdict as long as he could and that he had capitulated when two other jurors "collapsed."

The trial judge held an evidentiary [hearing at](#) which the above juror and another juror testified. The first juror reaffirmed his letter, but stated that there had been no force or coercion or "anything like that," and that he only voted guilty because "everybody else said we have now decided what we are going to do and we are the majority." However, the second juror testified that the first juror had agreed that defendant was guilty.

“[A] jury's verdict may not be impeached by the testimony or affidavit of a juror which shows the motive, method or process by which that verdict was reached. [The juror's] letter and testimony go to the very heart of the jury system. This is not a matter which courts take lightly. It is clear that

[the juror] was not coerced or intimidated in any manner, and that he was, indeed, persuaded by the evidence that defendant was guilty."

See also, [People v. Silagy, 116 Ill.2d 357, 507 N.E.2d 830 \(1987\).](#)

[People v. Holmes, 69 Ill.2d 507, 372 N.E.2d 656 \(1978\)](#) During defendant's attempt armed robbery trial, there was testimony that the heel of defendant's shoe matched that left by the assailant. Defendant filed a motion for new trial, supported by his attorney's affidavit, alleging that one juror had said that several jury members visited a shoe store and inspected the heels of various shoes for the purpose of ascertaining the trade designs. The trial judge refused to consider the allegation because of the general rule that a verdict may not be impeached by a juror.

There are two categories of verdict "impeachment." The first involves an attempt to prove, by juror testimony, the motive, method or process by which the jury reached its verdict. This type of "impeachment" is improper.

The second category involves situations where juror testimony or affidavit is offered to show that extraneous prejudicial information was improperly brought to the jury's attention or that an outside influence was improperly brought to bear. Because a juror should be permitted to testify about these matters, the trial court erred by refusing to consider the testimony in this case.

Not every instance in which extraneous or unauthorized information reaches the jury requires reversal. Here, however, the improper information was in the nature of evidence crucial to the question of defendant's identification. In addition, defendant was neither confronted with the evidence at trial nor given the opportunity to refute it. Under these circumstances, the conviction should be reversed.

[People v. Preston, 76 Ill.2d 274, 391 N.E.2d 359 \(1979\)](#) The trial judge properly refused to allow the defense to use a juror's deposition to show that the verdict was a "compromise." The use of affidavits or testimony to show the motive, method or process by which the jury reached its verdict is prohibited.

[People v. Pulaski, 15 Ill.2d 291, 155 N.E.2d 29 \(1958\)](#) After verdict, defendant sought to interrogate the jury as to whether they knew of the court's finding of guilty as to a co-defendant. The trial judge properly denied the request, since allowing the interrogation would have involved an attempt to impeach the verdict by the testimony of the jury which rendered it.

[People v. Nitz, 219 Ill.2d 400, 848 N.E.2d 982 \(2006\)](#) As a general rule, a juror's testimony is inadmissible to impeach a jury verdict. Exceptions to this rule include testimony which shows that a juror answered falsely on voir dire about a matter of potential bias or prejudice. To prevail on a motion for a new trial based on false testimony during voir dire, defendant must show that: (1) the juror answered falsely during voir dire, (2) prejudice resulted, and (3) the testimony concerned extraneous influences on the verdict rather than the process by which the jury reached its verdict.

A juror's affidavit stating that other jurors: (1) admitted answering falsely to voir dire questioning about their knowledge of defendant's previous trials, and (2) said they considered defendant's failure to testify in reaching a verdict, was inadmissible because it concerned the process by which the jury reached its verdict rather than extraneous influences.

[People v. Cearlock, 381 Ill.App.3d 975, 887 N.E.2d 893 \(5th Dist. 2008\)](#) The rule against impeaching a verdict with juror testimony applies not only when a verdict has been returned, but also when a mistrial is declared due to the jury's inability to reach a verdict. Here, even if a juror at defendant's first trial refused to acquit despite believing that the State had failed to prove its case, the testimony of three jurors from the first trial was not admissible at the hearing on defendant's motion to bar a retrial.

Further, even had testimony by the three jurors been admissible, there was insufficient evidence to establish that a juror refused to acquit despite her belief that the prosecution had failed to prove its case.

Although one juror testified that the recalcitrant juror gave such an explanation, two others testified that she gave a different explanation.

[People v. Pozzi, 42 Ill.App.3d 537, 356 N.E.2d 186 \(2d Dist. 1976\)](#) During post-trial motions defendant made an offer of proof, based on the affidavit of a juror, that before deliberations one juror told two other jurors that defendant "has a prior conviction in cases of this kind." The same juror also made statements throughout the trial about his personal knowledge of various considerations insofar as the police department was concerned, and bragged about his connections with the police association.

The general rule prohibiting jurors from impeaching their verdict is sound, however, that rule does not prevent a new trial where facts indicate that actual prejudice existed in a juror's mind or that extraneous matter not germane to the issue was introduced during deliberations. Here, the errant juror either had a prejudice against defendant which he failed to reveal at voir dire or was supplied information of a prejudicial nature during the trial and before deliberations. Because defendant was deprived of an impartial jury and a fair trial, the conviction was reversed and the cause remanded for a new trial.

[People v. Spice, 54 Ill.App.3d 539, 370 N.E.2d 129 \(4th Dist. 1977\)](#) During deliberations, the jury sent the following note to the judge: "[I]f a juror visited the site of the alleged crime during the trial would that unfairly influence the judgment of the jury." The judge apparently took no action concerning the note. At a post-trial hearing, a juror was permitted to testify that another juror had visited the crime scene and described the scene to the remaining jurors during deliberations. The juror also testified that the description influenced her vote for conviction.

The testimony by the juror that her verdict was "influenced" by the crime scene description of the other juror was improper, because it violated the rule against impeachment of a verdict. However, the juror's testimony about the other juror's visit to the crime scene and his report to the jury did not violate the rule against impeaching a verdict, and was proper. The unauthorized visit and description violated defendant's right to confront witnesses. The conviction was reversed.

[People v. Cabrera, 134 Ill.App.3d 526, 480 N.E.2d 1170 \(1st Dist. 1985\)](#) Statement of juror two hours after the jury was dismissed (that she wanted to dissent from the guilty verdict and change her vote) was inadmissible.

[People v. Crews, 191 Ill.App.3d 228, 547 N.E.2d 580 \(4th Dist. 1989\)](#) A jury may not impeach its verdict through affidavits or testimony showing its misunderstanding of the instructions.

[Top](#)